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# Siblings, contact and the law: an overlooked relationship?

## Full Report

Daniel Monk

Jan Macvarish

November 2018

“Siblings with existing bonds should in principle not be separated by placements in alternative care unless there is a clear risk of abuse or other justification in the best interests of the child. In any case, every effort should be made to enable siblings to maintain contact with each other, unless this is against their wishes and feelings.”

(United Nations General Assembly, Resolution: 64/142.  
*Guidelines for the Alternative Care of Children*, 2010, para 17)

“When you think about it, the courts always try to keep the routine or not disturb the child’s life and all that, try to keep it as normal as possible, but they’re separating the siblings from each other. How’s that keeping it as normal as possible when in reality, in the most perfect home, you get to see your siblings?”

(Research participant, aged 16, 2018)

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## About this report

This report presents the findings of the first socio-legal study in England and Wales to focus on siblings. Funded by the Nuffield Foundation, it is an exploratory study about how the sibling relationship is included and understood in care and adoption proceedings and identifies what might impede effective contact provision between separated siblings. It aims to promote reflective practice and informed decision making.

The report and a summary report are available to download from:

<http://www.nuffieldfoundation.org/siblings-contact-and-law-overlooked-relationship>

## About the Nuffield Foundation

The Nuffield Foundation is an endowed charitable trust that aims to improve social well-being in the widest sense. It funds research and innovation in education and social policy and also works to build capacity in education, science and social science research. The Nuffield Foundation has funded this project, but the views expressed are those of the authors and not necessarily those of the Foundation. More information is available at [www.nuffieldfoundation.org](http://www.nuffieldfoundation.org) | @NuffieldFound

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# SUMMARY

## OVERVIEW

This exploratory socio-legal research, funded by the Nuffield Foundation, is the first in England and Wales to foreground siblings. Based on an analysis of statutes, case law and interviews with practitioners, and informed by the views of young people, it highlights the impact on practice of underlying professional assumptions and the shifting legal and procedural framework. We hope this research will offer insights into current thinking about siblings and open up a dialogue between law and emerging research in social work and other disciplines, contributing to reflective and informed decision making where siblings are concerned.

## KEY MESSAGES

### 1 Siblings matter, but...

There is strong recognition of the importance of sibling relationships: that they are ‘the most enduring’ or ‘longest-lasting’ relationships in most people’s lives. They are increasingly considered a relevant factor in care and adoption proceedings, but the significance attached to them is easily and routinely outweighed by other considerations. The resulting tension is such that decisions which impact on siblings are sometimes described as ‘the hardest’, ‘the most difficult’, and ‘heartbreaking’.

### 2 Who is a sibling?

There is a lack of clarity and consistency in the terminology used to describe siblings in statutes. Professionals are keen to define siblinghood in ways inclusive of biogenetic, social and emotional meanings, however, in statutory definitions and in practice, strong recognition is given only to relationships between full and half siblings. Relationships between step siblings, and especially foster siblings, are rarely given weight in legal decision making. These limitations give rise to concerns that children’s views of ‘who matters to them’ are not always fully engaged.

### 3 Sibling relationship assessments

There is a lack of clarity in law and practice about when and how sibling relationships should be formally assessed. While ‘sibling assessments’ appear to be more common, there is no standard format. Concerns exist about the impact of time and resource limitations and that sometimes assessments function as evidence of decision making rather than a tool for better decision making.

### 4 Assumptions in assessments

Assessing the qualities of sibling relationships is subject to contestations over knowledge and expertise, in particular concerning the application of assumptions based on the psychological concepts of ‘attachment’ and ‘parentification’. Although psychologised language is used, in legal decision making it appears that the simple fact of the age of children tends to carry greater weight.

### 5 Placement planning and contact

Contact arrangements between separated siblings are heavily determined by placement type. There is a strong assumption that direct contact is appropriate for children in placements other than adoption, but facilitating contact for children in care and those subject to special guardianship orders raises challenges in practice. Guardians can play a crucial role in ensuring contact arrangements in care plans are detailed and specific to the sibling group. The role of the Independent Reviewing Officer (IRO) is critical for ensuring that contact is maintained. Questions exist about the capacity of both to fulfill these roles.

## 6 'Closed' adoption is the norm

When siblings are not placed together, adoption is the most serious risk to the continuity of their relationship. Three powerful assumptions may outweigh the promotion of anything other than indirect contact: that expectations of direct contact will deter potential adopters; that post-adoption contact should and can only take place with the agreement of adopters; and, that the security and stability of placements will be undermined by contact with siblings living with or in contact with birth relatives.

## 7 Adoption practice and the effects of *Re B-S*

Practitioners thought that the Court of Appeal judgment in *Re B-S* in 2013 was about parents and not siblings, despite the challenge it posed to adoption generally. However, two possible indirect consequences were suggested: any subsequent reduction in adoptions is likely to have resulted in some siblings remaining more closely connected and a re-energised focus on privileging birth family placements may give rise to tensions if adopters and birth relatives are keen to take on the sibling of a previously adopted child. Some practitioners find it hard to reconcile 'nothing else will do' as a prerequisite for adoption with attempts to ensure that siblings are placed together or, if separated, have direct contact with one another.

## 8 Considering older siblings

There is concern that insufficient weight is placed on the interests of older siblings, especially in adoption proceedings. A lack of clarity exists about the analysis required, particularly where some siblings are not subjects of the proceedings, and there is ambivalence about the use of the right to respect for family and private life under Article 8 of the European Convention on Human Rights. Assumptions about age, and distinctions between 'actual' and 'potential' relationships, can inform decisions about separation and contact but may disfavour the interests and wishes of an older sibling.

## 9 Sibling contact orders

It is exceptionally rare for sibling contact orders to be made in care and adoption proceedings and there is a lack of understanding about the circumstances in which they should be used. A preference exists for alternatives to orders such as 'time-limited' searches, recitals and other judicial recommendations about contact, but their efficacy is subject to question.

## 10 Siblings and parental responsibility

Decisions which impact on siblings are hard to separate from broader issues of parental responsibility. Half, step and foster sibling relationships are often dependent on parental and other adult choices and relationships, and parental neglect may be seen as the cause of 'parentified' relations between siblings. Concerns about siblings are sometimes perceived as being utilised by birth parents, and adoptive parents' concerns about birth parents often shape the prospect of sibling contact. As a result of the overarching focus on resolving issues of parental responsibility, children's own views about their siblings may be overlooked.

# 1: INTRODUCTION

Routine decision making in the Family Courts can have a significant impact on children and young people's sibling relationships. The impact is most profound in care and adoption proceedings in public law, as they can result in siblings being separated with limited or no effective provision for contact. This exploratory socio-legal research, funded by the Nuffield Foundation, is the first in England and Wales to foreground siblings. Based on an analysis of statutes, case law and interviews with practitioners, and informed by the views of young people, it highlights the impact on practice of underlying professional assumptions and the shifting legal and procedural framework. The findings speak only from this data; we do not make claims about the sector as a whole. While eschewing the possibility of finding easy solutions to a complex issue, we hope this research will offer insights into current thinking about siblings and open up a dialogue between law and emerging research in social work and other disciplines, contributing to reflective and informed decision making.

## 1.1 Background

It is an established general principle in law and child protection practice that siblings should, ideally, be kept together. Guidelines issued by the United Nations with the intention of enhancing the implementation of the Convention on the Rights of the Child 1989<sup>1</sup> state that:

Siblings with existing bonds should in principle not be separated by placements in alternative care unless there is a clear risk of abuse or other justification in the best interests of the child. In any case, every effort should be made to enable siblings to maintain contact with each other, unless this is against their wishes and feelings. (UNGA, Resolution: 64/142. *Guidelines for the Alternative Care of Children*, 2010, para 17)

Consequently, the separation of siblings as a result of intervention by the state and the failure to maintain contact between them has the accepted status of being an acknowledged problem that requires a response. This was the starting point for our research.

Despite the acceptance of the general principle that sibling relationships should be maintained, there are no accurate statistics which identify precisely how many children in the care system, including those subsequently adopted, are separated from their siblings nor, where they are, the extent or forms of contact between them.<sup>2</sup> That the scale of 'the problem' is unclear, in part because the Department for Education does not collect information about siblings, is itself indicative of the marginal status of the issue: despite being widely perceived as a problem it does not attract a high level of government attention.

However it is clear from a number of reports and surveys that a substantial proportion of children in care are separated from their siblings. Research by the Children's Rights Director for England found that 81% of children in care were separated from their brothers and sisters also in care (CRDE, 2009); and in 2011 in a larger survey the figure was 73% (CRDE, 2011) and in 2013/14, 71% (CRDE, 2014). The Family Rights Group found that just under half of sibling groups in care are split up and that 37% of children in care who have at least one sibling also in care are living with none of their siblings (FRG, 2011). Ivaldi found that only 37% of those placed for adoption were placed with their siblings (2000). Precise figures about contact are also unavailable, but research over a number of years by Neil and others has found that post adoption, a child is more likely to have direct face to face contact with a sibling than with other birth relatives, but that this is predominantly with siblings who have also been adopted (Neil, 2018).

Disquiet arising from these findings has been expressed formally in a number of contexts. In 2016, the UN Committee on the Rights of the Child, in its report on the United Kingdom, noted its concern about 'siblings being separated from each without proper reason' and reiterated that wherever possible alternative care placements should 'facilitate contact with ...siblings' (UNCRC, 2016: 52(d), 53(c)). The issue has also been raised explicitly by

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<sup>1</sup> The relevant provision under the UNCRC is Article 16 which provides that 'No child shall be subjected to arbitrary or unlawful interference with his or her privacy, family...and that the child has the right to the protection of law against such interference or attacks'.

<sup>2</sup> While local authorities are not required to collect statistics there are ways in which data could be collated by linking local authority children in care data with research about care proceedings. On data linkage see Masson et al 2018.



the All-Party Parliamentary Group for Looked After Children and Care Leavers (APPG, 2015). Senior members of the judiciary have also voiced concerns about the impact of current adoption practices on siblings. For example, Ryder LJ noted that ‘all too often adoption orders are made with all the best intentions for continuing sibling contact which are then thwarted for no particularly good reason’ (*Re P-M (A Child)* [2013] EWHC 1838, at 35). Similarly, Holman J observed that, ‘it is my experience that social workers and others sometimes overlook in these tragic situations that relationships between siblings may be the most enduring of all relationships in many people’s lives’ (*LB Haringey and MUSA* [2014] EWHC 1341 (Fam) at 8).

An extensive body of social work research has examined some of the causes and consequences of separation. This has revealed:

- the difficulties confronting local authorities in placing siblings together in long term fostering and adoption, especially when dealing with large sibling groups (Saunders and Selwyn, 2011; Hollow and Nelson, 2006);
- the extent to which older siblings provide ‘kinship care’ (Selwyn and Nandy, 2012; FRG, 2011);
- the emotional and educational benefits and the positive effect on the stability of placements, where siblings have been kept together (Jones, 2015; Argent, 2014; Shlonsky et al, 2005);
- that separated siblings often have to manage life-long issues of attachment, identity and loss (Cossar and Neil, 2013; Neil et al, 2015) and, at the same time, develop new social sibling relationships with other children (Selwyn et al, 2014).

Sustaining contact is consequently a critical issue and research that looks at the perspectives of social work practitioners and young people themselves, emphasises the importance of different forms of contact, as well as some of the practical difficulties encountered in supporting it (Kosonen, 1995; Rushton et al, 2001; Pike and Dunn, 2009; Argent, 2014; Selwyn et al, 2014; Mason and Gupta, 2015; Jones and Henderson, 2017; Meakins, Sebba and Luke, 2017; Neil, 2018 and 2007).

Even where direct contact occurs, infrequent meetings can mean that the regular, repeated and interactions normally considered to constitute ‘family practices’ are absent, in some cases creating barriers to feelings of kinship (Cossar and Neil, 2013). Training before and support after adoption have been identified as having an important role to play, and the challenges posed by social media are increasingly discussed (King, 2013; Selwyn et al, 2015).

Our research aims to contribute to the social work and practice literature by identifying the ways in which the legal process and legal decision making impacts on, and both aids and hinders attention to the sibling relationship.

Underlying much of the practice-focused research is an awareness of the complexity of sibling networks. The number of siblings, types, age ranges, and geographical locations, have all been identified as complicating factors in decision making (Cossar and Neil, 2013). These factors highlight the relevance for practice of the wider academic scholarship about siblings that has emerged in recent years in history (Davidoff, 2012) sociology (Edwards et al, 2005), psychoanalysis (Mitchell, 2003), psychology (Coles, 2003, 2006) and anthropology (Alber et al, 2013). While inevitably diverse, this literature emphasises the importance of being attentive to the effects of ‘common sense’ assumptions about siblings and how they can mask the temporal and cultural contingency of ‘siblinghood’ or ‘sibship’. These insights share much with socio-legal research which has long recognised and sought to make visible the role that law plays in both defining and privileging particular forms of ‘parenthood’ and ‘childhood’ (Bainham et al, 1999; Smart, Neale and Wade, 2001; King, 2004). In making a compelling case for taking ‘siblinghood’ seriously, the emerging research highlights:

- the key role that siblings play in child development, identity, and emotional wellbeing across the lifespan (Coles, 2003, 2006; Edwards et al, 2005, 2006; Rowe, 2008);
- how changes in the role of siblings have been central to key shifts in Western family and kinship structures (with a decrease in full siblings and an increase in half, step and social siblings);
- that the gender neutral concept ‘sibling’ is itself relatively recent (Johnson and Warren, 2011).

While focused on a particular issue, our research endeavours to open up a space for thinking about the rationales and parameters of what we refer to as ‘legal siblinghood’.

The theoretical and empirical research about siblings is important for a number of reasons. First, it highlights the importance of asking, ‘who, in law, is a sibling?’. Secondly it recognises that ambivalence, conflict, and ‘feelings of intense dislike and autonomy as much as closeness’ can be understood as ‘normal’, if not inherent, within siblinghood, and coexistent with the many positive aspects of the relationship (Edwards et al, 2005: 57). Utilising these insights in legal decision making is complex, particularly in the context of applications that require an assessment of the quality of a sibling relationship. Drawing on existing models of socio-legal research about children and families, our research explores the different forms of knowledge and dominant assumptions that inform legal decisions, the connections between ‘common sense’ norms and expert psychological theories, and what happens when they enter the legal domain (King and Piper, 1995; Piper, 2000).

Across all the disciplines, commentators have noted and sought to explain the paucity of attention to siblings. Smart has observed that sociology has ‘ignored almost completely the importance of sibling relationships’; and she links this to the discipline’s almost exclusive ‘focus on couples and their children’ (2007: 46). The historian Davidoff suggests that sibling relationships are ‘taken for granted...an absent presence’, because of their lack of direct effect on reproduction (2012: 1). Similarly, in anthropology, Alber et al note how both ‘classical’ and ‘new’ kinship studies have privileged parenthood and conjugal relations over siblinghood (2013). While in psychoanalytic theory, Mitchell argues that the ‘massive repression’ of their significance reflects the fact that ‘our social imaginary can envisage only vertical authority’ (2003: xv). These insights may explain the marginal status of siblings in official statistics, where the focus is on ‘dependent children’ and ‘households’ (ONS, 2015). Government data also fails to make visible the presence of siblings who are no longer dependent, the variety of types of siblings, and, linked to this, the increasing number of children who move between parents and primary carers across different households (Edwards et al, 2005). This is particularly significant for siblings in the public care system, whether looked after, in care or adopted, as they may not share the same parents or live in the same households. In order to acknowledge its conceptual and experiential distinctiveness, the broader literature encourages us to think about the sibling relationship not simply through the lens of the parent-child relationship. This is a critical insight and a challenge for this research and we endeavor to examine the extent to which value and weight can be attributed to a sibling connection in legal decision making that is concerned primarily with parenting and placements.

The relative silence about siblings noted in the other disciplines, and the explanations for it, also apply to law. Commentaries about cases relating to siblings exist,<sup>3</sup> but no legal research foregrounds the sibling relationship or examines how law addresses the status across legal fields; there are no chapters specifically about siblings in any practitioner or academic child, family, or social work law texts (with limited and sometimes no references to them in their indices). A simple explanation is the fact that the sibling relationship gives rise to few explicit rights and no obligations, and while premised on familial status, it is largely understood to be dependent on elective emotional attachment. As Sanders notes, ‘the rules for conducting a sibling relationship have never been established, ambivalence is its keynote and instability its underlying condition’ (2002: 1). Consequently, while in the context of the parent-child and spousal/cohabitee relationship there is much debate about the degree and form of legal regulation, with siblings the question of intervention is more complex and the rationale for state recognition and active interest in the relationship is less certain and far from established. Why should law intervene, and not simply how, is a key question that is rarely posed, but it may be a factor that explains both the relative silence and the perceived limitations of law.

In other jurisdictions, the US and most recently in Scotland, research has focused explicitly on the role of law in relation to siblings, particularly in the context of child protection (Hasday, 2012; Jones and Jones, 2018). A key challenge is how to draw on the concept of children’s rights in order to foreground the importance of sibling relationships for children’s development, wellbeing and identity, without assuming that existing ‘rights’ paradigms and campaigns, such as those relating to fathers and grandparents, can or should be simply transplanted or applied to siblings. At the same time, the long standing debates about contact disputes in private law contexts, and in particular the high profile afforded to campaigns by fathers, provide a different form of comparative perspective for highlighting the conditionality, challenges and limits of legal intervention (Kaganas, 2010, 2013). These debates are particularly pertinent to our research as they highlight tensions between legal and therapeutic interventions more widely (Reece, 2009; Kaganas, 2010).

<sup>3</sup> See, eg, discussion of cases about operations on conjoined twins (Sheldon and Wilkinson, 1997) and the taxation of cohabiting sisters (Auchmuty, 2009).

## 1.2 The legal framework

Existing and increasing recognition of siblings in public child law is evident from the explicit references to them in the statutory materials in both care and adoption proceedings. We identify the relevant provisions below. A key question we examine in this report is how in practice they are understood and applied. But before looking at the specific provisions, it is important to emphasise that a child's sibling relationship is a factor that can and arguably should be taken into consideration in the context of the best interests or paramountcy principle. In the Children Act 1989 it may be a relevant factor under a number of the headings in the 'checklist' in Section 1(3). And the general provision in the Adoption and Children Act 2002 in Section 1(2) to the child's welfare 'throughout his life' has a particular potential significance here, as it is frequently remarked that the sibling relationship is the 'most enduring' that most people will experience in their lifetime.

The sibling relationship is of course only one factor to take into account and key questions we examine here are:

- what weight is placed on it?
- in what circumstances is it deemed, if ever, decisive?
- what factors in practice result in it being marginalised?
- how are the potentially divergent interests of siblings determined and acknowledged?

In the context of the last question we note that the Law Commission's review that led to the reforms introduced by the Children Act 1989, proposed a modification of the paramountcy rule whereby:

...the interests of the child whose future happens to be in issue in the proceedings before the court should not in principle prevail over those of other children likely to be affected by the decision. Hence their welfare should also be taken into consideration. (The Law Commission 1988: para 3.13)

Revisiting this proposal has a particular relevance for this research in exploring the assumptions about shared or divergent interests and concerns about the status and needs of older siblings, particularly in adoption and where they may not be subject to proceedings.

## 1.3 Care proceedings

The Children Act 1989 (CA 1989) was the first statute to include a provision which used the word 'siblings'. This provision provided that, 'a person may exceed the usual fostering limit if the children are all siblings' (Sch 7, para 3). A similar acknowledgment of the benefits of keeping 'looked-after' siblings together was also included in the original Section 23 and this was made more explicit with an amendment by the Children and Young Persons Act 2008 which provides that the local authority must ensure that placements are such that:

...if C has a sibling for whom the local education authority are also providing accommodation, it enables C and the sibling to live together (CA 1989 s 22C(8)(c)).

Compliance with this duty is subject to what is 'reasonably practicable in all the circumstances of C's case' (CA 1989 s 22C(7)(b)). Guidance similarly emphasises that, 'Wherever it is in the best interests of each individual child, siblings should be placed together', that it can be an 'important protective factor' but that, 'a number of factors however, can militate against achieving the positive placement of brothers and sisters together' (DoE, 2015: paras 3.21–3.25).

However this provision does not apply where a local authority is considering adoption for the child, as a result of amendments introduced by the Children and Families Act 2014 (CA 1989 s22(9A), (9B)).

Where children in care are separated from a sibling, provisions address the question of contact. Before making a care order the courts are required to consider contact arrangements and invite comments on them from the parties (CA 1989 s 34(1)). A local authority must also 'unless it is not reasonably practicable or consistent with his welfare, *endeavour to promote* contact between the child and...any relative, friend or other person connected with him' (CA 1989 Sch 2 para 15(1)(c)). More explicitly the statutory regulations provide that 'If C has a sibling for whom the responsible authority or another authority are providing accommodation, and the children have not been placed together', then the care plan must include:

the arrangements made to promote contact between them, so far as is consistent with C's welfare (The Care Planning, Placement and Case Review (England) Regulations 2010, SI 2010/959, Sch 1, para 3(1)).

Siblings are also referred to explicitly in guidance and regulations about the reviewing of contact arrangements for children in care (DoE, 2015: paras 2.85 – 2.94). It advises that:

Maintaining contact with siblings is reported by children to be one of their highest priorities but it requires the active involvement of social workers and children's carers to facilitate this contact in a way which supports the development of healthy sibling relationships between children who are not able to live together (DoE, 2015: para 2.85)

Where a child is in care, a local authority is under a duty to allow a child reasonable contact with his parents (CA 1989 s 34(1)(a)). This additional protection does not apply to siblings and proposals to extend it to them have been made by a number of commentators (Family Justice Review, 2011: 15; FRG, 2016; Pepper, 2017; Richardson et al, 2017). Most recently amendments to this effect were included in the Children and Social Work Bill 2017 which, while rejected, led the government to make a commitment to strengthening the contact rights of siblings by amendments to the care planning regulations (Ashley, 2017).

Under Section 34 of the Children Act 1989, the courts have the power to make contact orders between children in care and their siblings. However, unlike parents, siblings must seek leave (sometimes referred to as 'permission') of the court to apply for such an order (CA 1989 s 34(3)(b)). The same leave requirements apply where a sibling makes an application for contact under a child arrangements order under private law, with either a child in care or one that has been adopted (CA 1989 s 10(8), (5B)). Proposals to remove the leave requirement for siblings have been made, but to date no action has been taken (Family Justice Review, 2011; FRG, 2016; Pepper, 2017).

## 1.4 Adoption proceedings

Post-adoption contact with birth family members including siblings, historically, was highly exceptional, and continued to be so after the introduction of the Children Act 1989, despite changing attitudes in practice. But the importance of contact was emphasised by statutory reforms in the Adoption and Children Act 2002 (ACA 2002). The key provision is the duty on the court to take into account:

the likely effect on the child (throughout his life) of having ceased to be a member of the original family and become an adopted person...and...the relationship which the child has with relatives...including: the likelihood of any such relationship continuing and the value to the child of its doing so and...the wishes and feelings of any of the child's relatives, or of any such person, regarding the child (ACA 2002 s 1(4)(c), (f)(i), (iii)).

The court also has the power to make a contact order between siblings both at the time of making a placement for adoption order and when making an adoption order, or at any time afterwards (ACA 2002 ss 26, 51A).

## 1.5 Social and political context

One of the challenges of undertaking research about siblings in public law proceedings is that the relationship can be a relevant factor at every procedural stage, from the initial investigation to post-adoption. And the legal status of their placements can, and will, often differ. For example, in one sibling group, there might be a young adult living independently, another child living with birth parents or with a relative under a Special Guardianship order, another might be accommodated or in long term foster care, while others might be adopted, either together or in separate placements. Siblings consequently are subject to the impact of reforms across the system and concerns about them can play a part in informing a variety of legal, policy and political debates.

In the context of adoption separated siblings are 'birth family' relatives and consequently our research encountered and had to engage with the long standing but recently reinvigorated wider debates about adoption (Gove, 2012; Sloan, 2014; McFarlane, 2017, 2018; Isaacs, 2017; Featherstone et al, 2018; Neil, 2018). The Children and Families Act 2014 (and subsequently the Children and Social Work Act 2017<sup>4</sup>) amended the legal framework

<sup>4</sup> Courts and adoption agencies must now have regard to the child's relationship with *prospective adopters*, as well as relatives, Children and Social Work Act 2017, s 9.

and introduced what has been described as ‘a distinctly more negative and restrictive tone’ towards more open adoption practices (Harris-Short et al, 2015: 973; Hughes and Sloan, 2011; Sloan, 2014). A speech in November 2012 by Michael Gove, the then Secretary of State for Education, made clear the thinking behind the reforms and the implications for birth siblings:

...the wishes of adults and children to keep siblings together – or to maintain historic relationships – can work against the interests of children – who may best be served by being adopted as quickly as possible and forming as secure an attachment as possible with their new parents...as reform bites so it becomes even more imperative that we accelerate and increase the numbers becoming approved adopters. (Gove, 2012)

At the same time, the landmark decisions of *Re B (A Child)* [2013] UKSC 33 and *Re B-S (Children)* [2013] EWCA Civ 1146 have highlighted a potential tension between government policies and judicial rights-based concerns. The result has been much debate, uncertainty and misunderstandings (Doughty, 2015; Masson, 2018; Featherstone et al, 2018).

Other significant contextual factors for our research include the changes introduced in response to the findings of the Family Justice Review in 2011, in particular the introduction of the unified Family Court, procedural time-scales and rethinking the use of experts (Masson, 2015). Similarly it is impossible to ignore that this research was undertaken at a moment when there are widespread concerns about resources and acknowledgment of a ‘crisis’ in the care system (Thomas, 2018).

Exploring *what* significance is placed on the sibling relationship requires examining the assessments and analysis undertaken by legal and non-legal practitioners; in doing so, the research also touches on debates about the roles of the Independent Review Officer (Narey and Owers, 2018; Puffett and Lepper, 2018); concerns about changes in the role of the Guardian, and more long standing tensions about the role of the courts and local authorities (Masson, 2018).

In this report we endeavor to identify how these complex and often politicised debates and reforms impact on siblings. At the same time, by taking an analytical rather than an advocacy approach, we observe how attention to siblings can emphasise or legitimise different standpoints, rather than attempting to resolve or take a position in these debates.

## 2: METHODOLOGY

### 2.1 Rationale

The aim of the project was to fill a knowledge gap in an under-researched area: the way in which child sibling relationships are understood and dealt with in law. Our methods were therefore designed to identify:

- the multiple layers of law in action;
- concerns in the policy field about what happens to child siblings in the care system;
- the key legal moments when sibling relationships are brought to the fore;
- the terminology and concepts used to describe them and;
- the assumptions which underpin decision making and practice.

From the outset, the project considered its task to be an exploratory one; to ‘throw a pebble in the water’ as a way of offering initial insights and to map out possible areas for future research. Qualitative methods were considered to be best-suited for bringing to light the *meanings* attached to sibling relationships and to be realistic within the confines of a small-scale study conducted over a time-frame of 18 months.<sup>5</sup>

### 2.2 Advisers

#### Advisory Board

An Advisory Board of law and social work academics and professionals with direct knowledge of public child law proceedings played a crucial role in ensuring that the research was capable of identifying and addressing the most pressing sibling questions. We were able to draw on the separate expertise of each member but also to bring them together for two discussions: one at the start and one at the end of the fieldwork. Their insights and practical advice proved invaluable in shaping our methodology and sharpening the focus of our findings. We are extremely grateful to all of them for giving so generously of their time.

#### Young People’s Participation Group

Involving young people in all aspects of a research project as *participants*, as opposed to being only the objects of research or only advisers, is an innovative yet proven method which is informed by a commitment to undertaking research that is compliant with the principles enshrined in the UNCRC (Lundy and McEvoy, 2012). Young people’s active involvement was achieved by establishing a Young People’s Participation Group (YPPG), comprised of members of the Family Justice Young People’s Board (FJYPB). The co-ordinator of the FJYPB helped us to recruit members who had siblings and experience of family law proceedings (predominantly public). The participants were aged between 10 and 23 years, with a mean age of 14.

When acting in an advisory role, the YPPG contributed to our plans for fieldwork, commented on our findings and ensured that their views are reflected in our dissemination work, but our two workshops with members were also a source of new data.

The first workshop took place before the interviews with professionals and involved activities designed to prompt discussions about possible ‘sibling scenarios’ in which professionals might make decisions about separating siblings or keeping them together. We used Lego figures to construct different placement options and household configurations. We also asked the young people to put themselves in the position of judges or social workers, in part because we did not want them to feel under pressure to share their own personal stories, but also because we were interested in understanding how they might imagine that professionals think

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<sup>5</sup> As a tool for revealing the workings and a deeper understanding of family justice the qualitative approach adopted here owes much to the ground breaking work of John Eekelaar and Mavis Maclean (2009 and 2013) and to the earlier work on family lawyers by Sarat and Felstiner (1986).



about siblings. This also allowed them to express their views about what a child's perspective might be in those scenarios. Through these activities, we were also able to gain insights into the words they used to describe sibling relationships and how they defined who was and who was not a sibling. A second workshop, conducted after the fieldwork and during the writing-up process, allowed us to present our findings to the YPPG and for them to respond. We also worked with them on developing guidance for professionals when working with sibling groups, worded in language accessible to young people to bring adult and child perspectives closer together. Some, but not all, members attended both workshops.

The sessions were recorded and transcribed, allowing the material to be analysed in MAXQDA, the data analysis software system, alongside our other data. The YPPG data was important in sensitising the statute and case law findings, and the subsequent methods, to the possible perspectives of children and young people.

## 2.3 Methods

The methods were structured into three stages, mediated by consultations with the Advisory Board and the YPPG.

### Stage One: Mapping review of the statutory framework

To map the statutory references to siblings in England and Wales, the Westlaw and Lexis databases were searched using the terms 'sibling/s', 'brother' and 'sister'. The initial review did not aim to provide a comprehensive or detailed analysis of every statutory reference, but to develop a sibling-focussed timeline of legislation, to map any changes in this over time and identify consistencies and inconsistencies in the language and meanings framing siblinghood. A more detailed review of the statutory instruments, regulations and guidance documents relating to siblings in the public care system was then undertaken. This identified the most significant legal and policy changes to examine their impact, and highlight specific areas for further exploration in the practitioner interviews.

### Stage Two: Analysis of the case law

Judgements in cases reveal judicial thinking, but they also contain the facts presented to the court by other legal and non-legal practitioners. They are therefore a rich potential source of data to draw out the working assumptions about sibling relationships which operate within care proceedings. The aim of the case law review was not to provide a detailed analysis or critique of the substantive decisions nor to engage simply in doctrinal analysis, but rather to map the moments, contexts and applications in which the sibling relationship is referred to in legal proceedings. Using the keywords 'sibling/s', 'brother' and 'sister' in the Westlaw database, we identified just under 3000 cases between the period January 1991 to April 2018. The timescale was chosen to coincide with the period after the coming into force of the Children Act 1989.

The general sample of 3000 cases was analysed to identify sibling terminology, key legal moments when sibling relationships are brought to the fore in proceedings and the distinctive doctrinal arguments applied to decisions about them. By reading summaries of these cases, the sample was reduced to 299 cases with the greatest pertinence to siblings. The vast majority of them were public law cases, but some were private child law and other cases where the sibling relationship appeared critical. Of the 299 cases, 75 from the period 2001–2013 were read and analysed in a conventional note-taking way, identifying key and recurring themes, terminology, moments where sibling considerations come to the fore, determining positive, negative and ambivalent descriptions of sibling relationships and noting where consideration of the sibling relationship is absent. This contributed to the iterative development of a system of analysis which could subsequently be applied to other data.

The full texts of 224 more recent cases, from 2014–2018, were analysed using the MAXQDA data analysis software system. Treating case law as qualitative documentary data in this way is innovative in socio-legal studies. Use of the software allowed a much more extensive and systematic analysis of the texts, using thematic and legal coding. This marked another stage in the development of the system of analysis which was then applied to the interview data.

### Stage Three: Interviewing professionals

The case law analysis confirmed that in legal proceedings the sibling relationship is often simply one of many relevant background factors to be taken into account in determining the 'welfare of the child', and only very rarely the sole or primary issue. To build a more complete picture of thinking about siblings across the legal system, we conducted structured individual interviews and focus groups with a sample of professionals involved in public child law proceedings. This enabled us to encourage professionals to reflect specifically on siblings in a dialogue with the researchers and, in the case of the focus groups, with other members of their profession, so that sibling relationships could be foregrounded in a way that does not often happen in practice.

A total of 69 professionals, including social workers, independent reviewing officers (IROs), children's guardians, judges, barristers and solicitors, were interviewed to construct a cross-sectional view of the terminology, concepts and assumptions at play when professionals are considering sibling relationships. Recruitment was purposive, seeking out interviewees from the key professional groups, located in towns and cities in the North, Midlands and South of England in order to gain insights into the range if not the pattern of possible variation in thinking and practices. Fieldwork began in November 2017 and was completed in May 2018.

Solicitors and barristers were approached at the Association of Lawyers for Children conference in 2017 and the principle investigator (PI) also addressed the conference, leading to additional interest. Other lawyers were contacted 'cold' through family law firms in towns or cities we particularly wanted to include or through existing professional contacts. The solicitors and barristers acted for parents, children (mainly in public law) and for Local Authorities. All lawyers were interviewed individually, in person, except for one barrister who was interviewed via Skype owing to time pressures. Individual interviews rather than focus groups were chosen because we were advised that this would echo their usual way of working and allowed us to cover a wider geographical spread of court and local authority areas.

With the prior approval of the President of the Family Division, judges were recruited through the PI's existing professional contacts and through recommendations from other practitioners. Five were interviewed individually and six others joined a focus group, whose recruitment was very helpfully facilitated for us by a further judge with whom we were already in contact.

Approval was granted, as required, from Cafcass to interview two directly-employed Cafcass guardians. Three self-employed guardians were recruited via an email circulated to the NAGALRO mailing list. It was decided to interview guardians individually because of their central role in legal proceedings.

A call was put out for IROs through the email list of their professional bodies, NAIRO and NIROMP, leading to the formation of two focus groups, one in the South and one in the North of England.

Two focus groups of social workers were recruited via existing contacts with senior leaders of children's services, one in the South and another in the North of England.



**Table 1: Professionals and interview method**

| Professional Type                     | Number and method of interview                             |
|---------------------------------------|--|
| Solicitors [including 3 LA employees] | 10 individual interviews                                   |
| Barristers                            | 5 individual interviews                                    |
| Judges                                | 5 individual interviews and 1 focus group of 6 individuals |
| IROs                                  | 18 individuals in 2 focus groups                           |
| Guardians                             | 5 individual interviews                                    |
| Social workers                        | 20 individuals in 2 focus groups                           |
| <b>TOTAL</b>                          | <b>69</b>  |

We recruited professionals from a range of locations in order to gain a picture of possible variations in practice (see Table 2: Regional features of the sample). Professionals were asked to reflect on their full professional experience, rather than just to speak of their current place of work. Again, this was to capture the maximum possible range of thinking about siblings but also in recognition of the fact that individuals alone cannot provide a wholly reliable account of practices in a specific location at a particular time, as they will tend to recall cases and practices across their careers.

**Table 2: Regional features of the sample**

| Professional            | Region  | Additional characteristics  |
|-------------------------|---|---|
| 10 Solicitors           | 5 London; 5 outside London (North East, North West, South East, Midlands) | 3 Local Authority (from different LAs); 7 private practice (from different practices).<br>Between 20–23 years of experience.    |
| 5 Barristers            | 3 in London; 2 outside (North East, North West)                           | Between 9 and 23 years of experience.   |
| 11 Judges / Magistrates | 2 in London; 3 outside London.<br>1 Focus Group outside London.           | 1 Magistrate; 3 Circuit; 1 High Court<br>Focus Group: 6 Circuit and District.<br>Between 8 and 23 years of judicial experience. |
| 18 IROs                 | 8 in London and 10 in North West England                                  | Between 5 and 41 years of experience.   |
| 5 Guardians             | 2 London; 3 outside London  | 2 Cafcass guardians; 3 self-employed guardians.<br>Between 5 and 30 years of guardian experience.                               |
| 20 Social workers       | 10 in North West England and 10 London                                    | Between 1 and 30 years of experience, drawn from Children in Care team (North) and Fostering Team (South).                      |

A core interview schedule was produced, informed by the prior stages of research and in consultation with our advisers, which was then tailored to each professional group but with most questions used across different groups. The focus group schedule was a simplified and more open-ended version of the interview schedule for individuals. (Copies of the research instruments are available on request from the research team). All interviews were recorded, professionally transcribed and anonymised, prior to analysis using MAXQDA.

Both members of the research team conducted interviews and both were involved in the focus groups, but Professor Monk interviewed all of the judges because greater legal expertise was required and Dr Macvarish

facilitated all of the focus groups for the sake of consistency. We identified ourselves as ‘informed outsiders’ rather than fellow professionals, although the interview schedules reflected knowledge of law and practice gained from the previous stages of the research and the background literature review. We made it clear that we held no particular position on what should happen to siblings and were not looking to test them on their knowledge or practices.

## 2.4 Analysis

Terminology and concepts which emerged as significant during the Stage One Mapping Review were created as ‘codes’ in MAXQDA to form an initial framework of analysis by which the case law could then be read in Stage Two. In turn, the reading of the case law produced new codes which were incorporated into the framework by which the Stage Three interview data was read. The transcripts of the first YPPG were also uploaded to MAXQDA for analysis in the same way. This analytical strategy proved to be an effective way of bringing the different types of data, reflecting different layers of law, into a dialogue with one another.

For more information about MAXQDA see: <http://www.maxqda.com/what-is-maxqda>.

## 2.5 Ethics

The research complied with the Ethics Statement of the UK Socio-Legal Studies Association (<https://www.slsa.ac.uk/index.php/ethics-statement>) and received ethical approval from the Birkbeck College School of Law Ethics Committee. Approval was granted by the President of the Family Division for the participation of judges. Specific approval was granted by Cafcass for the recruitment of the Cafcass guardians, for the formation of the YPPG from FJYPB members and for the involvement of Cafcass staff who co-ordinate the FJYPB.

## 3: TERMINOLOGY – WHO ARE SIBLINGS?

Identifying where ‘siblings’ and ‘brothers and sisters’ are referred to in statutes and how they are defined was the starting point for this research. We then examined how these concepts are applied and understood in the case law and by the professionals working in child care proceedings. But first we consider why the issue of ‘terminology’ and the question ‘who is a sibling’ are so crucial.

### 3.1 The problem of terminology and definition

Lord and Borthwick’s good practice guide, *Together or Apart? Assessing Siblings for Permanent Placement*, one of the most commonly cited texts in the practitioner literature, offers the following definitions of siblings: ‘children who share at least one birth parent’ and/or ‘children who live or have lived for a significant period with other children in a family group’ (2014<sup>6</sup>: 2). However, these definitions leave open the questions of ‘what is a significant period?’, ‘significant to whom?’, ‘what is a family group?’, and, indeed, ‘what is a birth parent?’. Researchers have undertaken the task of developing an appropriate lexicon more precisely to capture contemporary sibling relationships, particularly those of children in the care system. A key text here is the review of international literature by Christine Jones (2015). An underlying intention of much of the research is to make visible more complex sibling relationships which may be obscured by existing terminology. Examples of the expanded sibling vocabulary developed in recent work include Kosonen’s ‘core’ and ‘kin’ siblings (1999); ‘stranger siblings’, ‘undocumented siblings’ and ‘familiar siblings’ (Jones and Henderson, 2017); ‘intact’, ‘partially intact’ and ‘completely separated’ siblings (Wulczyn and Zimmerman, 2005; Albert and King, 2008); ‘together’, ‘separated’ and ‘splintered’ siblings (Hegar and Rosenthal, 2011) and ‘continuously together’, ‘apart’ or ‘disrupted’ siblings (Linares et al, 2007).

In response to attempts to promote post-adoption contact between birth families and adoptive families, new concepts such as ‘dual connections’, the ‘adoption triad’ and ‘the adoption kinship network’ have also emerged (Cossar and Neil, 2013). These new descriptions try to capture the sibling relationships of children as they come into, move through and leave the care system, but further work will be needed to synthesise some of these terms, thus making possible comparisons across varied studies, policy domains and academic disciplines.

The concepts outlined above map what has *happened to* siblings but may not capture what these relationships *mean* to the children themselves. As well as trying to forge conceptual coherence through consideration of what may sometimes be extremely complex family relationships, research also needs to be alert to individual, familial, cultural or other group variations in the way sibling relationships are referred to and understood by the subjects of research: not all people share the same biogeneticised underpinnings of siblinghood nor the same expectations of children and their relationships (see the Government of South Australia Office of the Guardian for Children and Young People, 2011 for examples of cultural variation).

It has been noted that greater attention is now being paid to the ‘internal workings’ of siblinghood, through empirical work, particularly in the field of psychology (Sanders, 2004). This resonates with Gillies’ observation that as relationships between adults and household arrangements have become more fluid, sociological and political focus has turned from questions of family structure to questions of relationship qualities (2011). New research promises to incorporate into the category of siblings, sibling-like ties between children, including those which develop through adoptive, foster and step-families, where biogenetic links may be absent and the significance of relationships highly subjective to the particular child or children. The fact of being in care or separated from parents as a result of state intervention may give a very different meaning and perhaps a greater significance to siblinghood for the children concerned (Bank and Kahn, 1982), but this increased significance may be complicated by the assumption (or reality) of a heightened risk of dysfunction or conflict within families that experience state intervention.

If there is a disconnect between system-based conceptualisations of siblinghood and those held by the individuals whose lives they organise, there is a danger that people’s meaningful intimate relationships will be rendered invisible, undervalued or even destroyed. If a value is to be placed on sustaining the sibling relationships of children in the care system, practitioners need to know how to identify who a child’s siblings are, when this may not be

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<sup>6</sup> First edition 2001, second edition 2008, reprinted 2011, 2013, 2014.

obvious, and be able to determine which relationships should be prioritised and what might best sustain them. Moreover, in order to comply with the legal requirement to ascertain the wishes and feelings of children it is necessary to be attuned to the different ways in which young people might describe and attribute significance to sibling relations. The way a sibling relationship is conceived ‘from the outside’ might impact on, or provide a rationale for, legal decision making. For example, a biogenetic connection with someone unknown might legitimise a different type of contact from a connection based on shared experience. Consequently ‘who is a sibling?’ is a conceptual and definitional question, but also a procedural and administrative question.

Questions of definition matter in practice because in order to benefit from legal protections, siblings first have to be identified as such. However, there is not necessarily agreement on whether siblings are to be objectively or subjectively defined; whether sibling status is a matter of biology, experience or imagination. As Lord and Borthwick acknowledge (2008), this raises many difficult considerations. Siblings may exist who are not yet known to each other, but who could become important over time; children may choose to exclude from their social worlds people who are considered by law, and in official guidance, to be significant siblings. In such cases, is it the responsibility of practitioners and children’s carers to ‘hold in trust’ the possibility of sibling relationships developing in the future? Some professionals told us that law is ‘not in the business of creating relationships’, but if siblinghood connotes a prior existence (in biogenetic connections or through experience), does law have a role in protecting and maintaining sibling relationships where the state has played a role in disrupting them? The need for clarity about siblinghood is therefore essential to informed, reflexive and sensitive decision making.

### 3.2 Siblings in statute

While the focus of this research is care and adoption proceedings, a starting point for addressing the question ‘who is a sibling?’ was an examination of statutory references to siblings more widely. The aim was to identify the extent to which legislation presents a coherent model for defining and categorising siblings and the possible rationales for divergence; in other words, to identify and explain the parameters of contemporary ‘legal siblinghood’.

The review revealed the following:

- there are over a hundred statutes which include a reference to siblings and these have been increasing over the past twenty-five years;
- where siblings or brothers and sisters are referred to, it is often without the provision of a definition;
- where definitions are provided, they vary considerably both in breadth and language.

#### Including siblings

Statutes including a reference to siblings cover almost all of the conventional categories of legal practice: from predictable contexts such as family (public and private) and inheritance, to property, crime, taxation, social security, housing, mental health, commercial, medical, agricultural, and even ecclesiastical. Much of the legislation was enacted within the last twenty-five years. That law has a very considerable amount to say about the sibling relationship may have particular significance for children who have been the subject of care proceedings. The increased possibility of being separated from siblings and, if adopted, of legal severance, is consequently not only a matter of emotional well-being but may impact on other substantive issues.

The underlying rationales for the perhaps surprising number of references to siblings are rarely based on exclusively biological or genetic connections. The only clear examples of this are provisions in medical-reproductive law about ‘donor-conceived-genetic siblings’ and ‘saviour-siblings’.<sup>7</sup> Medical rationales also inform restrictions on siblings in the context of criminal law proscriptions of sexual relations and in the prohibited degrees of marriage.<sup>8</sup> But these provisions are also premised on a social connection or ‘connectedness’, a term Smart uses to describe ‘an awareness of connection, relationship, reciprocal emotion, entwinement, memory’ (2007: 189). This ambivalence about what constitutes ‘connectedness’ is suggested in the colloquial expression ‘blood is thicker than water’; as an observation, an injunction and a warning, it carries complex assumptions that relationships, while viewed and experienced socially, may have a physical or genetic basis. The social rationale is evident in statutes by the fact

<sup>7</sup> Human Fertilisation and Embryology Act 2008 ss 3, 24.

<sup>8</sup> Criminal Law Act 1977 s 54; Sexual Offences (Amendment) Act 1992 ss 2, 64; Marriage Act 1949 s 78; Civil Partnership Act 2004 Sch 1.

that siblings are rarely treated as a particular, distinct or isolated relationship, but are more often included within broader categories, not restricted to biogenetic links; the most frequently used is that of 'relative'. But other terms used are 'member of the family'<sup>9</sup>, 'connected person'<sup>10</sup>, 'qualifying relationship'<sup>11</sup>, 'interested person'<sup>12</sup>, 'dependant'<sup>13</sup>, 'non-qualifying individual'<sup>14</sup>, and 'associates'.<sup>15</sup> These categories frequently also include references to 'uncles and aunts', and the quality and nature of these parental sibling relationships is often significant in care proceedings.

In some contexts, assumptions about the nature of the sibling relationship legitimise the denial of legal protections which would otherwise arise. This is evident in employment law, based on perceptions of familial closeness and assumptions about practices within family businesses. It is possible to perceive here the long legacy of siblings being understood to be part of a family economy (Davidoff, 2012). Similarly, where someone cares for a sibling, this is excluded from 'qualifying child care' in the contexts of subsidising child care.<sup>16</sup> In all these contexts, activities which would otherwise be subject to legal regulation are, on the basis of the relationship, deemed effectively a 'private' matter. In other contexts the same assumption leads to the relationship being perceived as *potentially suspect*: too close to be deemed independent and a mask for subverting legal regulation or avoiding taxation. This explains why siblings are referred to in statutes, such as the Breeding and Sale of Dogs (Welfare) Act 1999, which on the surface might appear to have little to do with care or family life.<sup>17</sup>

In other contexts recognition of 'connectedness' gives rise to what can loosely be referred to as 'rights' or entitlements, to benefit, to have knowledge of or to have contact with or to be informed or consulted. Some are premised solely on the *status* of being a sibling, for example potential inheritance rights under the intestacy laws.<sup>18</sup> Others are premised on idealised or conventional assumptions about inter-sibling *behaviour*, suggesting a degree of emotional care and entwined emotional wellbeing arising from the relationship.<sup>19</sup> A recent example of the latter relates to missing persons, where the sibling relationship establishes a right to intervene in applications for a guardianship order.<sup>20</sup> Similar assumptions inform provisions in mental health legislation.<sup>21</sup> In these contexts law both acknowledges and reflects normative ideals about the relationship but falls short of imposing duties or obligations.

## Defining 'siblings'

The tensions between the different rationales underlying the statutory references to siblings come to the fore when law attempts to *define* them. While the gender neutral word 'sibling', in its modern usage, is increasingly used in policy documents and academic literature, it occurs less frequently in statutes, where 'brother or sister' remains more common. While historically the position of sisters was distinct, gender discriminations have been removed almost entirely.<sup>22</sup> A child's sex is, however, part of the welfare checklist<sup>23</sup> and while gender equality laws apply to courts and local authorities they do not extend to the parental treatment of sons and daughters in the private sphere (Monk, 2018).

9 See, for example, the Housing Act 1996 ss 143H, P.

10 See, for example the Charity Act 2011 s 117(2)(c), Taxation (International and Other Provisions) Act 2010 ss 159, 163.

11 See, for example the Human Tissue Act 2004 s 27(4).

12 See, for example the Mental Capacity Act 2005 Sch A1 Pt 13, para 185(f).

13 See, for example the Fatal Accidents Act 1976 s 1 (3)(g).

14 See, for example the Finance Act 2013 s 136(1).

15 See, for example the Licensing Act 2003 s 101(3)(b), Corporation Tax Act 2010 s 941 (7)(b), (8).

16 Finance Act 2004 s 318C. In the Isle of Man these restrictions extend to the regulation of care (Nursing and Residential Homes Act 1988 s 19). A broader more social definition, which might or might not include siblings but not on account of the status per se, applies to similar exceptions in England and Wales: Health and Social Care Act 2008 (Regulated Activities) Regulations Sch 2.

17 Breeding and Sale of Dogs (Welfare) Act 1999 s 4. See also, for example, the Enterprise Act 2002 s 127(6); the Estate Agents Act 1979 s 32(3); Consumer Credit Act 1974 s 184.

18 Administration of Estates Act 1925 s 46(1).

19 There are parallels here with the distinction between parental 'status' and 'parenting' in understandings of the concept of parental responsibility (Harris-Short, Miles and George, 2015: 679; Neale and Smart 1999).

20 Guardianship (Missing Persons) Act 2017 ss 4, 19, 21, 24. Similar provisions apply where a person is presumed dead and in relation to specific provisions about burial grounds, accidents at work and the use of Human Tissue: see Presumption of Death Act 2013 ss 1, 20; High Speed Rail (London–West Midlands) Act 2017, Sch 20 Burial Grounds; Fatal Accidents Act 1976 s 1 and the London Local Authorities Act 2007 s 74; Human Tissue Act 2004 s 27.

21 Mental Capacity Act 2005 s 185 (f).

22 The only exception relates to succession to hereditary honours, see Agnew and Black (2018).

23 Children Act 1989 s 1(3)(d).

The word ‘sibling’ appears in statute for the first time in the Children Act 1989, however, it is not possible to attach any particular or intended significance to the introduction of the term here. It is not attributable to the fact that it is family law legislation; the second statute to use the word ‘sibling’ (and indeed the first to come into force) was the Breeding and Sale of Dogs (Welfare) Act 1999 and different terminology is used in subsequent adoption legislation. It is also not attributable to a change in practice by Parliamentary Counsel; at the same time and in subsequent legislation, the earlier expression ‘brother or sister’ is used (for example, in the Mental Health Act 1998 and the Housing Act 2004). It is also not attributable to an intention to expand the category. This is demonstrated by the fact that there is no consistency in the legal definitions provided of either ‘sibling’ or ‘brother or sister’. While in law no weight is attached to the use of the generic gender-neutral term of sibling over brothers and sisters, there is evidence that *beyond* law amongst professionals and young people in particular, the word ‘sibling’ is sometimes experienced as demeaning, jargonistic and ‘unfeeling’ (Community Care, 2018). This was confirmed by participants in the Young People’s Participation Group who suggested that it was ‘quite posh’, ‘complicated’ and ‘not really hearty’. This is not to say that the word is unclear, but that it is a descriptor that is deemed unsuitable for referring to a real person or relationship. It is then perhaps curious that it was introduced in a piece of legislation that is, rightly, associated with enhancing attentiveness to the wishes and feelings of children and young people.

There is no consistency in the statutory definitions of ‘siblings’ or ‘brother or sister’ and sometimes no definition is provided. This can be attributed to individual drafting styles and consistency within, as opposed to across, categories of law, particularly in the context of legislative reforms or consolidation. But it is also evidence of a lack of consideration of the issue by Parliamentary Counsel.

The Children Act 1989 does not define ‘siblings’. The current statutory guidance refers to siblings as children ‘from both the same or different parents’ (DoE, 2015: para 2.85). While this clearly includes ‘half’ siblings, it could potentially include ‘step’ siblings. In his foreword to the guide to the Children and Families Act 2014, Edward Timpson MP, the then government minister, referred to ‘foster brothers and sisters’ (DoE, 2014: 1). But it is not clear if these children are ‘siblings’ for the purposes of the legislation; indeed it is arguable that they are not, as the provision which provides that ‘a person may exceed the usual fostering limit if the children are all siblings’ (CA 1989, Sch 7, para 3) can be interpreted as implicitly excluding children who have previously been fostered or accommodated together but who do not share a birth parent.

The Adoption and Children Act 2002 makes no reference to the word ‘siblings’. They are referred to in provisions about contact (ACA 2002, ss 26, 51A) as ‘relatives’ or a ‘related person’, which is defined as including ‘...brother, sister...whether of the full blood or half-blood or by marriage’ (ACA 2002, s 144(1)). The reference to ‘by marriage’ might extend the provision to step-siblings, but from the drafting it is far from clear. The Adoption Agency Regulations refers to ‘brothers and sisters (of the full blood or half-blood)’ in the context of relevant information about a child’s family (AAR 2005, 16(2)). But in a separate regulation there is a reference to step-siblings as, ‘other children of each parent’ (Ibid, Sch 1, Pt 4, para 3.3). There are no official references to foster or other wider kin or sibling-like relations. In the context of post-adoption contact orders, these connections may, however, be included in references to ‘any person with whom the child has lived for a period of at least one year’ (ACA 2002, s 51A(e)).

No other statutory definitions of ‘siblings’ or ‘brothers or sisters’ refer to foster siblings, but ‘step-siblings’ are referred to explicitly in the Equality Act 2010 and the Mental Health Capacity Act 2005.<sup>24</sup>

Half siblings are explicitly included in most, but not all, statutory definitions and the terminology varies; sometimes, as in adoption law, the definition includes references to ‘full-blood’ or ‘half-blood’, whereas in many other contexts the reference is just to ‘brother’ or ‘half-brother’ or ‘full’ or ‘half’. In nearly every context, and regardless of terminology, no distinctions are made between ‘full’ and ‘half’. Exceptions to this are the rules relating to intestacy<sup>25</sup> and certain mental health provisions.<sup>26</sup>

24 Equality Act 2010 s 86(5); Mental Capacity Act 2005 Sch A1 Pt 13, para 185(f).

25 Administration of Estates Act 1925 s 46 (1), Table (v). The Law Commission recently considered but decided against recommending the removal of the distinction. Responses to the issue were mixed. Some suggested that people “tend to think of themselves as just ‘siblings’”, while others noted that, “there is some sense in the presumption that you are closer to your full siblings, than your half siblings” (Law Commission, 2011, paras 3.16–3.27).

26 Mental Health Act 1983 ss 26 (3).



References to 'blood' add nothing to the meaning in practice. There appears to be no obvious reason why 'of the full blood or the half blood' is used in the Guardianship (Missing Persons) Act 2017, for example, but 'half-brother' or 'half-sister' is used in the Equality Act 2010. However, while in law use of the word 'blood' adds nothing, the use of the word in the context of adoption law is of symbolic significance. The Adoption and Children Act 2002 provides that: 'An adopted person is to be treated in law as if born as the child of the adopters or adopter' (ACA 2002 s 67(1)). Birth family relatives of an adopted person, including siblings, are acknowledged, but are defined as persons who, '(but for his adoption) would be related to him by blood (including half blood) or marriage' (ACA 2002 s51A (3)(a), 81(2)). The language here reflects the extent to which legal severance is imagined as akin to a legal 'blood' transplant: law undoes blood. It is an example of how 'blood' is a symbolic concept as much as a physical, material substance (Bale and Feldman, 2015). It is hard to reconcile the terminology used here with the commitment in the Adoption and Children Act 2002 to recognising the benefits of sustaining birth family and sibling relations. Suggesting that siblings are no longer 'blood relatives' is, at the very least, outdated if not confusing and, potentially, unnecessarily distressing. We note that the Law Commission of New Zealand considered this language to be 'a repugnant and unnecessary distortion of reality' (2000: 43–44).

The lack of a coherent definition in law is not necessarily a problem. There may be justifications for treating people as siblings in one area of law, but not in others. Where this is the case the distinctions ought to be considered and based on sound reasoning. If the sibling relationship is deemed to matter, then clarity about who is a sibling is required, in particular whether it relies on a biogenetic connection. If it does not, then the opening up of greater contingency in meanings needs to be explored and its implications considered.

### 3.3 Siblings in case law and practitioner interviews

Judgements in cases can reveal how judges conceptualise sibling relationships but, as they contain the facts presented to the court by other legal and non-legal practitioners, they also offer insights into the working assumptions held by others involved in care proceedings. The questions asked in our interviews with professionals were informed by the statute and case law reviews and the contributions from the Young People's Participation Group, but the interview schedules were sufficiently open-ended to allow the nuances and complications of practice to emerge. As we asked professionals about their views and opinions as well as their experiences from practice, we were able to identify and explore the gap between interviewees' appreciation of the potential complexities of siblings relationships and the possible limitations of the framework of meanings within which they work.

#### Full and half-siblings

##### An equalising ethic but a recurring distinction

The distinction between half and full siblings was frequently articulated in our practitioner interviews. Very often the first answer to the question 'who are considered to be siblings?' was, 'full and half'. The terms generally appeared spontaneously, whereas other sibling distinctions such as 'maternal/paternal', 'step' and 'foster', were usually offered only after further probing by the researcher. The recurring distinction between full and half siblings co-existed with a common view that it has undergone a blurring in recent years at the level of everyday experience. As this guardian said:

*I think now people will count as their siblings their half siblings...because of societal changes...They will refer to them as their siblings. (Guardian 4)*

The movement towards a more 'inclusive' consideration of siblings was described as necessary to deal with profound changes in family life.

*I think the concept of family is going through a revolution...in more recent years I've certainly litigated a handful of cases whereby in same-sex partnerships you have children who aren't genetically linked at all or only half genetically linked, where there's been adoptions, for example, so I think the concept is flexible. (Solicitor 6)*

Many professionals welcomed this change and sought actively to blur the half/full distinction. There seemed to be an ethical sensitivity to giving half-siblings the same value as full siblings.

*There's no such thing as a half-sibling in my mind, that's a full sibling. That is a brother or a sister, even though on paper it will say 'half-sibling'. (Barrister 5)*

*A sibling's a sibling. (Judge 2)*

The commitment to validating broader, relational understandings of 'families' as opposed to what is often thought to be the narrower institution of the 'traditional family' found recent expression in a lecture by Sir James Munby welcoming more diverse family structures and practices:

*In contemporary Britain the family takes an almost infinite variety of forms. Many marry according to the rites of non-Christian faiths. People live together as couples, married or not, and with partners who may not always be of the other sex. Children live in households where their parents may be married or unmarried. They may be brought up by a single parent, by two parents or even by three parents. Their parents may or may not be their natural parents. They may be children of parents with very different religious, ethnic or national backgrounds. They may be the children of polygamous marriages. *Their siblings may be only half-siblings or step-siblings.* Some children are brought up by two parents of the same sex. Some children are conceived by artificial donor insemination. Some are the result of surrogacy arrangements. The fact is that many adults and children, whether through choice or circumstance, live in families more or less removed from what, until comparatively recently, would have been recognised as the typical nuclear family. This, I stress, is not merely the reality; it is, I believe, a reality which we should welcome and applaud. (Munby, 2018, emphasis added).*

Like Munby, some of our interviewees, as well as eliding the distinction between full and half siblings, were also keen to extend the category of sibling to include biogenetically unrelated siblings.

*And I think also you need to look at step-siblings, you need to look at kids that have been raised together. So a sibling relationship isn't necessarily just a sibling relationship. (Guardian 2)*

This guardian demonstrates an awareness of the gap between siblings understood in law, and the conceptualisations of siblings which exist beyond the law.

In the case law, there are many references to full or half siblings, indicating that this distinction is considered a relevant fact. Where it is not immediately obvious in the written judgement that a person referred to as a 'brother' or 'sister' or a 'sibling' is 'half' or 'full', it tends to become clear from the facts of the case. In some cases, the nature of the relationship between the children, who are identified only by initials, is not explicitly described or labelled, but is made clear by the identification of their parents. A typical formulation is:

*SB gave birth to C, and a little over a year later, she gave birth to K. In September 2006, SB gave birth to L. RP is the father of D, S and C, he is not the father of either K or L. (SB v County Council [2008] EWCA Civ 535, at para 11)*

In the case law 'blood relative' was sometimes used synonymously with 'birth relative', but references to 'blood' were not used to describe individual full or half siblings, even though, as outlined above, that concept is referred to in adoption legislation. Similarly, in the practitioner interviews, 'blood' was only referred to in the abstract as the underpinning for the legal categories of 'siblingness':

*I suppose the default position is keeping siblings together...we usually then interpret that as just blood-related siblings and maybe you have a kind of mental sliding scale about how important siblings are depending on...if they're a step-sibling, if they're an older step-sibling, are you moving further and further away from...that kind of core belief really. (Social Worker Focus Group North)*

A guardian suggested that siblings connected by biological parentage were understood to be more acknowledged, in law, than step-siblings.

*...I think perhaps we all tend to give full siblings a greater sort of...I don't want to use the word value but I suppose because legally if children...have a step relationship, they're not a biological relationship, then legally they have...no connection. (Guardian 5)*

But she immediately followed this by suggesting that children's experience 'might be very different from that'; in other words, that children's perceptions of sibling relationships were likely to value shared experiences and emotional connections more than biological or legal connections.



The project's Young People's Participation Group also felt strongly that 'a sibling's a sibling' and confirmed the significance of disparities in terminology and meanings between professionals and children in care.

*...well our brother, he has a different dad to us but the same mum, but he's always our brother to us because his dad passed away before we were born. We just call him our full brother.*

*It's really annoying and it makes you feel really upset and like angry inside because it doesn't really matter whether it's half or full, they're still your sisters at the end of the day.*

*I think with step siblings as well because I have four step brothers from my step mum...and when they took me into foster care...they told me on the day and came and picked me up half an hour later, so my little brother...he was literally sat in my front garden like screaming and crying when they came and got me and they were like, 'oh it's just your step brother'.*

*I told them I just wanted to see my sisters and he said, "Well we can't really do that because if they were your full sisters then we might put it in place, but right now we can't because they're not...they're your half sisters so it's not as important as like full. But then I changed over to this woman and she said that that was wrong for him to do that.*

*They don't refer to how you feel or how you would like it to be. They don't really ask you how you'd want it to be referred as. They just go along with whatever they want to do.*

*...so maybe my step brothers, I call them my brothers because I've lived with them since I was eight...And even though there's no blood relationship or even, like my dad isn't even with my step mum anymore, but I still call her my step mum and them my brothers...because the courts would always refer to them as 'Mary's children' and they're my brothers...one of them literally had to be told that I wasn't his sister because I'd lived there since he was like two so it was like we're like brother and sister.*

### Flexible approach to the weight of full and half

The cases and interviews reveal flexible approaches to the weight placed on the different categories of siblings. The relationship between this flexibility and the need to legitimise possible placements for children in care was usually implicit but sometimes explicit. This contingency was very apparent in the case law.

In some cases where judges refer to the full or half distinction, without making reference to any evidence concerning the quality of the relationship, there is an implicit, but not decisive, weight applied to the distinction. For example, in upholding a decision that a child should be placed for adoption with an already adopted older sibling, rather than with his father's cousin, Munby, P held that the placement of the two full siblings together was preferable to separating them, even though in this case the separation would have allowed one of them to live with birth relatives.

*How else was the judge to proceed? She was confronted with the fact – the reality – that B's *only full sibling*, H, a sibling close to her in age, had been adopted. (*Re B (A Child)* [2018] EWCA Civ 20, at para 24, emphasis added)*

The fact that they were *full* siblings is not decisive but seems to add weight to a decision that challenges an emerging assumption about the preference for birth families over adoption. Similarly, Thorpe LJ upheld an application for leave to apply for a contact order by one sibling with another, citing their 'full' sibling status (*In the Matter of R (Children)* [2013] EWCA Civ 1018). But conversely, the fact of 'half-siblinghood' can sometimes be cited as factor legitimising separation:

*While separation from siblings is usually undesirable and to be avoided, the children in fact have different fathers. (*Re N (a minor)* [2014] EWHC 749 (Fam) at para 49)*

### Significance determined by parental relationships and attitudes

In contrast to the cases highlighted above, at other times we can see that the material significance of full or half-sibling status is dependent on evidence of the attitudes of or relations between parents and adults. Across the interviews, it was clear that relationships between parents are crucial to the way in which sibling relationships were considered. In the case of step-siblings, the sibling-like relationship between children was weighed against a

pragmatic assessment of whether a couple could be expected to maintain relationships once the households had separated:

*It will have impacted on them, in effect losing their step-parent and their step-siblings, but realistically I don't think there's any way that, you know, they could be facilitated to have that as an ongoing relationship...You know, they're not going to get back together in the future as a family unit so...I guess that will just be part of their experience of living with people and then ceasing to live with them and have contact with them. (Guardian 5)*

The way parents treat or feel connected to the children, rather than just the biogenetic quality of the relationship is brought into consideration. This is particularly clear in a case where a father does not wish to take on responsibility for a child's half-sibling but does want the siblings to maintain regular contact:

*I say nothing further in relation to the father's proposal, which of course is a contingency plan that if the mother was unsuccessful that he would seek to have the two youngest children – his own children of course – cared for by him. He does not, and he has been very frank and honest about this, offer a home for S as well but obviously wants her to keep up her very regular contact with her younger siblings should they move to him. (Kent County Council v R & M [2016] WL 06639561 at para 25)*

In a similar case cited by an IRO, two half-siblings were likely to be separated because relatives wanted to take parental responsibility only for the child to whom they were biogenetically related.

*I've got a case at the moment where two siblings are placed together, quite young children, and the foster carer's saying they've got a really good relationship, they're really close, but...neither the father or the aunt – they're different dads obviously – are interested in the sibling group. They just want the child that they're related to. (IRO Focus Group South)*

In a particularly revealing example of certain judicial thinking, where a maternal grandmother was being considered as a carer for half-siblings, only one of whom was her biogenetic relative, the court held that:

*SH is not A's biological grandmother. She has been called, in a phrase I find rather unattractive, her 'psychological' grandmother. The fact is that A has a loving bond and relationship with A – no different from that which she would have if KH were indeed her birth father. SH formed an attachment to A at a time when she believed her son, KH, to be A's father. All parties agree that legally I treat SH no differently than I would if she were indeed the biological grandmother of A and thus a connected person so far as A's half-sibling K-F. (Derbyshire County Council v SH, No. ER14Z0002/3, 16.6.15 (2015) WL 4578522 at para 49)*

Not only is the biogenetic half-sibling relationship between the two children judged to be significant, the grandmother's earlier belief in her own biogenetic relationship with the child seems to be seen as significant to the bond they have created, even though the fact of the biogenetic bond has been undone, the fact of the emotional tie remains.

In the case law, the extent to which the biogenetic nature of the relationship is a relevant fact is most acute in cases where DNA tests are required to resolve questions of paternity. In many cases it is clear that significance is attached to whether a child is a full or half-sibling but this is rarely expressed directly. It is important to emphasise that the distinction is not based on law, rather it appears to be utilised to support or provide an additional rationale for a legal or social work practice decision, such as whether a parent is willing to take responsibility for a biogenetically unrelated half-sibling of their own child.

In *Re R (Children)* [2014] EWCA Civ 1110 a father who *did* want to take responsibility for his child's half-sibling, to whom he was not biologically related, was unsuccessful in his attempt to challenge the adoption of the half-sibling although he had been caring for both children together. It is probable that this separation of half-siblings would have been less likely had they been full siblings.

In the case law, children's own views are often relevant in the *assessment* of the relationship, but very rarely in terms of definition or terminology. For example, a child who has lived apart from her full siblings in one case is referred to as not seeing them 'as her "siblings"'...she barely knows them and they have never demonstrated any interest in her' (*T v K, Z, Liverpool City Council, The Egyptian Ministry of Social Solidarity* [2016] EWHC 2963 (Fam) at para 134).

## Bringing in the social

Despite the impression from the cases described above where parentage seems to outweigh siblinghood, in fact the biogenetic is always read *alongside* the social: the system appears adept at complicating the conceptualisation of siblings, permitting greater flexibility in achieving placements for children. As a barrister noted:

*I think practitioners – you know, legal practitioners, social work practitioners and judges – are more creative than just looking at the blood link. (Barrister 4)*

This can be demonstrated by exploring the ways in which the non-biological dimensions of sibling relationships are given significance, most notably when practitioners talk about who is or is not present in a household, make comparisons between sibling and cousin relationships, or consider the weight given to foster sibling relationships.

## Household

The 'household' emerged from the interview data as a place where the social and emotional aspects of sibling relationships are understood to be forged through shared experiences. Sharing a household intersected with blood and parentage in complex ways. It was often the starting point for information-gathering about family relationships and could have a determining effect on later placements:

*I suppose the approach we would take is, well, who's living in the household at the time that you issue the proceedings and whether there's a birth tie or not, certainly if they've been living together for some time then I think if they're not technically siblings, they certainly would be considered to be in the pot in terms of, well, actually they've got a relationship and should we be keeping that relationship going? We should be keeping that relationship going. (Solicitor 3)*

The term 'household' seemed to allow for the inclusion of a wider number of children in the category 'sibling' or 'sibling-like', in particular, step-siblings. One interviewee suggested that equal weight could be given to biogenetically unrelated children as to related children on the basis of shared experience:

*...two separated families coming together when the children are very young and those children have grown up together, that'll be given, in my experience, equal weight, because it's the knowledge they have of one another really as opposed to the blood relationship which is significant. (Solicitor 1)*

They went on further to emphasise that blood was actually less important than experience:

*So if it's two, you know, a child of the father and a child of the mother that have been brought up together, they'll be given more value perhaps than another half sibling that may come along but actually has never lived with either of them. So it's the knowledge. In my experience, I think it's the knowledge. (Solicitor 1)*

However, according to one judge, considering children in such inclusive terms usually required a 'degree of judicial prodding as well. Or from the guardian.' (Judge 1).

## Cousins

In some examples given by professionals, cousins were described as living together in the same household in a 'sibling-like' way. These cases were particularly interesting because they revealed that where there was a biogenetic term, such as cousin, to describe a relationship, 'sibling-like' could be overlaid onto this to connote a greater closeness, derived from sharing a household 'like brother and sister'. Here a social worker describes how cousins can have a sibling-like relationship, apparently expanding the category of sibling while simultaneously invoking their 'shared blood' as being of legal significance.

*So I had a case where a child was placed with his aunts and he was living with...his cousin but, you know, very, very similar in age, so they will be growing up over the next 10 years as siblings...They do share some blood really so obviously within the court arena...we do tend to look at...(Social Worker Focus Group North)*

Talking about a similar case, a barrister describes the flexible boundary between sibling and cousin relationships, allowing unusually close cousin relationships, forged through sharing a household, to be given the weight of siblinghood without requiring a shift in terminology.

*...if they are living within the household at the time and it's sort of acknowledged that there's a close bond there...They wouldn't be called a sibling though, of course, they would be called a cousin but...I actually tend to find social workers are quite good at being sensitive about that and understanding and appreciating that because they live within the same household, they live as though they are brother and sister...You know, the literal meaning versus the emotional meaning for me are two different things sometimes. (Barrister 5)*

A parallel household arrangement was found in the case law, with a professional recorded as arguing that cousins can be 'as brothers', without disrupting family norms.

*In our view it is not a major or negative distortion of family relationships in this case for cousins to grow up together as brothers. (JJ & MJ (Mother and Father) v AT & AT (The Adopters), Neath Port Talbot Borough Council (Local Authority), AJ (Child) [2007] EWCA Civ 55, at para 51)*

The cousin-sibling spectrum could also move in the opposite direction: siblings who were less close, particularly if physically separated, could be described as being 'like cousins'. In one case the proposed contact arrangement between two pairs of separated siblings was described by the judge as,

*...much more like that in other family situations where, for example, cousins meet or something of that kind. (London Borough of Bromley v SJ & Others, No: ZE14CO0129 [2014] WL 7255403, at para 57)*

The terminology here is interesting as it reveals an implicit understanding of familial terminology as expressions not just of biogenetics but of social and psychological and experiential importance.

The demotion of a sibling relationship to a cousin-like relationship was considered more negatively when participants in the Young People's Participation Group discussed what might happen if siblings were separated through care proceedings.

*If it's long-term that he's in that foster home and he won't see his siblings, he's going to forget where he came from and all that and he's going to forget his siblings if he doesn't see them as often. Pretty soon it's going to end up being like they're not his siblings, they're like cousins to him. (YPPG1)*

Siblings who have little contact were described as relating to each other 'like a friend or something or a distant cousin'. Another participant said:

*Because cousins aren't as strong as proper sisters and brothers but they still are strong. Like our cousin who lives quite far away, we only see him like once a year for a couple of days but we're still quite close. (YPPG1)*

In these accounts, the biogenetic aspect of the cousin relationship is presumably considered significant but may also have been materialised, socially and emotionally, in the shared family history of the parents, as siblings.

### Foster siblings

According to our young advisers, some of whom were in foster care, the experiential aspect of relationships was quite clear. It was obvious that a child in a foster placement would, 'probably end up being like a brother and sister relationship' with other children in the household 'because they're with them children like 24/7' (YPPG1). When asked to consider hypothetical placement scenarios, they were clear that the relationships between foster siblings 'will probably be just as significant as a sibling relationship'. This indicates the significance of cohabitation to the formation of sibling-like relationships and suggests that children who move from a foster placement risk losing 'that kind of like sibling connection that they made with the foster parents' children' (YPPG1).

*Well my carer, she's looked after a lot of children before...there was this little boy before and he'd been with us for quite a while and everyone in the family...was like either 'son' or 'brother' and then when he left us I still saw him a bit like, every so often and I still referred to him as my little brother but like the professionals didn't like us to do that and they were like putting words into our mouths and saying that he is like not a brother even though we felt that he was. (YPPG2)*

Our young advisers told us that they would refer to their foster siblings as brothers or sisters, sometimes to avoid marking themselves out as children in care,

*I get asked a lot of the time... 'oh why do you call him Tony?' and stuff like that and it's just... it's upsetting but then at the same time like they don't know and sometimes you think oh if I tell them then they'll understand, they won't judge me, but like when I do tell people it's really hard to tell them and I think that it'll be okay but then people start judging me for the fact. (YPPG2)*

Only one professional spontaneously raised co-resident foster children when asked 'who are considered to be siblings?', and she was herself a foster carer. There were no examples found in the case law of foster siblings being attributed 'sibling-like' status. This would seem to reinforce the argument that the determining influence of parental or quasi-parental responsibility, and in particular the need to move children in care to available placements, limits the extent to which foster siblings can acquire sibling status. The need for 'the system' to have flexibility in placing children seems to require a downplaying of the potential social and emotional significance of shared sibling-like experiences of children in care in a way that would not happen with genetically-related children. It also reinforces the view of long term fostering not providing the same 'family like' permanence of adoption, an issue returned to below.

That children in foster care can build emotional ties with one another was widely acknowledged by the practitioners. A social worker with fostering experience told us;

*I think if a child's put up with a fostering family, the children that are there become their siblings too... so it's how the child feels about those foster children. Like sometimes they'll see the other foster children within the placement as their siblings. Sometimes they'll see the foster carer's birth children as their siblings but often it is about how they identify. (Social Worker South Focus Group)*

Another social worker also demonstrated an awareness of such bonds, built through shared placement;

*Because you can have a two-year-old child who's lived with another child for 18 months and then moves on, you know, and just because they're not birth siblings, they've lived together in a family environment for the same amount of time they would have done or more than they would have done with a sibling. (Social Worker Focus Group North)*

To which a colleague responded:

*And you would never do that... if there was blood, you would think that's really bad practice to separate. You just wouldn't do it, would you, if they were birth siblings and you separated them after two years. It just wouldn't happen, would it? (Social Worker Focus Group North)*

Others commented on the significance to children and young people of sibling relationships within the foster family, confirming research conducted with foster siblings (Rees and Pithouse, 2018).

*One of my young people... (the foster carers have an adult son) and he calls the adult son his 'brother from another mother'. (Social Worker South Focus Group)*

*...when you place your young people and they develop the relationships with either the foster family's children or other children... and then the impact when they go, because they do view them as siblings and so want to be part of a family. (Social Worker Focus Group North)*

Social workers with strong links to the fostering service agreed that the foster sibling relationship 'can get forgotten', suggesting that this can be repeated in the lifetime of a child as 'a lot of children have a lot of moves' resulting in 'a lot of children then consider[ing] them siblings'. They did not think that the significance of such relationships was reflected in law, but there was some sense that this might be changing:

*The fostering network, they're pushing that a lot more now in terms of siblings and continuing relationships, that that is also considered. (Social Worker South Focus Group)*

### Who gets considered, who gets missed?

We can see the difficulties in establishing clear definitions of who is and who is not a sibling amongst children who live together. But it was also evident from our data that although there is wide acknowledgement that sibling relationships exist across households, there can be problems with identifying siblings who are not living together at proceedings and who may never have lived together. Without concerted investigation, some siblings could

remain invisible to the system, most obviously children not subject to proceedings, who are not co-resident with the subject children.

*Well I think the danger is that the immediate preoccupation will probably be on the membership of the particular household and it's therefore possible that significant relationships with other, usually older, siblings who live in other households are not adequately taken into account. (Barrister 2)*

There was widespread agreement that paternally-related siblings were the most difficult to identify.

*So that's the issue, particularly on the paternal side is where issues tend to come up a little bit more because...you tend to have dads who if they're not living with that particular child, if they don't want you to know about that child, if it's a different age group, that's where I find that sometimes you might struggle. But you don't know if you're struggling because you don't know what you don't know, do you? (Social Worker North Focus Group)*

*But you can have complex situations, can't you?...five siblings, three dads, two of those dads we have no knowledge of, one we don't even have a surname of and the other was an illegal immigrant who it's believed has been returned to his country of origin in Africa, so we have no idea what other family may exist and no way of researching. (Solicitor 1)*

For some professionals, paying attention to both maternal and paternal siblings was part of a new way of thinking which might be described as more 'sibling aware'.

*...it's quite often paternal siblings that are sort of missing from the picture. So some training that we're doing at the minute is trying to get people to...think about that paternal side of the story really and to not forget about siblings, even if they are grown up. They don't have to be the same age as the child you're working with, they could be grown up half siblings but for us they could still count as part of that picture. (Social Worker Focus Group North)*

As noted earlier, the desire to work with an inclusive category of siblinghood was evident across the professional groups, even though this often required a bridging of the gap between law and the reality of complex and fluid family relationships.

*...obviously full siblings, no problem. Half siblings, no problem. But then of course we get into the fictive kin, children who have been brought up together as quasi step-siblings – I say quasi because technically of course step-parent in the eyes of the law is only somebody who's married to the parent – but children who are brought up in the same family...can forge extremely close relationships and become very important relationships, so the whole family structure is much wider than the...legal connections...I'm not making a distinction in terms of the importance, I'm making purely a distinction in terms of the law. Because at the moment there is nothing in law other than the overarching best interests principle or paramount interest I should say, that requires a judge to have regard to the relationships with people who are not actually legal relations, save to the extent that with the Adoption and Children Act, we actually have to consider the possibility of losing a relationship with somebody who's part of the original family. (Judge 1)*

Although there was a lack of clarity about legal definitions, and a confusion about the legal status of step-siblings that mirrors the lack of clarity in the legislation, there was evidence from other judges that non-biological siblings could be included in sibling decision making:

*I don't know what the legal...but if dad has other children or mum has other children, they are siblings. I think that if the new partner where they have lived has children that come and visit on a regular basis, I would still class them as siblings in my mind. Now, they probably wouldn't with regard to a legal test. I've never had the argument. But they would be important people that I would take into account. So I would class anybody that they have a sibling or sibling-like relationship with as siblings for this initial work. (Judge 2)*

According to this judge, even though such children might not be defined in law as siblings, both the welfare test and the references to 'connected persons' in the 2010 regulations could enable their relationship to be given weight in decision making.



## ‘Skewing the legal relationship’

A number of cases grappled with siblings having different legal relationships, for example, in one case where half-siblings were living together, they were treated differently because only one of them had contact with his birth father. Justifying the adoption by their carers of the child without parental contact but not of the one still seeing his father, McFarlane LJ held that:

The distinction in status between the children was fully justified. B had a live and active relationship with their father, whereas T never had, nor was he likely to have in the future. Accordingly, his need for a full, lifelong parental relationship, in legal terms, was of an altogether different order to that of B. That need could only be satisfied by the making of an adoption order and the recorder had therefore been right to prioritise it, despite the skewing of the legal relationship that T and B had. (*T (A Child: Adoption or Special Guardianship)*, *Re Also known as: T (A Child) v Wirral BC* [2017] EWCA Civ 1797, at para.21).

Other cases consider the fact that adoption changes the legal relationship between children: half-siblings adopted together by the same adopters become in, law, full siblings, as do children not related in any biogenetic way, if adopted by the same people. This is also the case in the relationship between an adopted child and the biogenetic children of the adopters, as was noted in one case:

...by this plan for adoption for all three children, all three will be rendered full siblings rather than half siblings as they are currently. It is not a major factor in the case, but I anticipate that it is going to be in their interests for them to understand that they have a full equal status within the family with respect to each other and with respect to M and T. (*In the Matter of F (A Child)* [2014] EWCA Civ 1360 at para 54)

The two cases above reveal a different weight being attached to the potential ‘skewing of the legal relationship’ between siblings: in the first, concern for the father-child relationship overrides legal parity between siblings, in the second, legal parity between siblings is said to be in their best interests.

Children were also reported as expressing an awareness of the significance of their legal status. In one case, a child was said to be clear about the legal consequences of adoption:

...he is absolutely clear in expressing a wish to be adopted. He fully understands what adoption means and he is particularly anxious to be of the same status as his brothers. (*K, K v F Y, C (Through the Child's Guardian Peter Taylor)* [2014] EWHC 3111 (Fam) at para 22)

Another child, this time in a troubled placement, is noted as making clear that she would not see her carer's future child as her sibling. Here the existence of a legal relationship does not match the child's view. The other children seemed to have some understandable confusion about their sibling relationship with Child D and why she lives with their grandparents.

L saw two boys and claimed that they were her brothers T and D. L insisted that they were despite what she was told by Mrs V and became quite upset. Later that evening she brought it up with Mr V and went on to say that in Romania she was sleeping in the same bed as her brothers, when he said it was not appropriate for siblings to share a bed L became annoyed and said that if the Vs had a baby it would not be her sibling as she had the family she loves in Romania. (*Hertfordshire County Council v LC (deceased), AC, RV, EV, L (A Child)* [2015] EWHC 3191 (Fam) at para 67)

Once again we see the potential complexities of children's views of their sibling relationships and how these may be difficult to square with legal definitions.

## Dividing siblings: Age and ‘sib-sets’

Age emerges as the most significant driver of sibling decision making. Consequently, categorising siblings as ‘older’ or ‘younger’ is, in practice, frequently more important than other descriptions such as degrees of biogenetic connection or gender. We include a brief discussion of age here, in the context of terminology, but will return to it in later sections. The comment below by judges in the focus group is indicative of how age-based categories are applied and take precedence over other possible distinctions:

J1:...so if you have two children at the younger end and one at the older end, the starting point is separation because the older child is not going to be adopted and the younger children are going to be adopted and

*we have the standard balancing exercise adoption's better than long term fostering so that's the plan for the younger children. It's almost written.*

J2: Age driven. (Judges Focus Group)

Categorising sibling relationships by age is closely connected to the concept of 'sib-sets'. In the case law, the concept of 'sib-sets' (or 'sibling groups') was used to talk about dividing a larger group of siblings into different placements. The meaning of 'sib-sets' is not precise, but it is important to note the matter-of-fact use of this conceptualisation of relationships. While the most common delineators of 'sib-sets' is age, it may also correlate with half and full sibling categories, reflecting changes in parental relationships over time, for example, where a mother has two children with one person and then later has more children with another man.

### **Emphasising and assessing the quality of relationships**

Promoting a more inclusive categorisation of siblings, which transcended biology-based status, tended to result in talk of the emotional quality of sibling or sibling-like relationships. When asked 'who are actually considered to be siblings?', one solicitor replied,

*I think they all are. They look at it in the scientific sense of you're a half sibling or a full sibling, but they tend to think about it more in terms of quality of relationship, I think. (Solicitor 1)*

And another solicitor illustrated similar thinking:

*You'd obviously differentiate...when you're writing an assessment, you know, so-and-so is a full sibling, so-and-so is a half sibling but I don't think that would be necessarily massively significant to the assessment, it would be more the strength of relationship. (Solicitor 9)*

*So we've moved beyond simply seeing children who are connected by biology...the genetic link is clearly the starting point, but we've got to think about psychological siblings, those who may not be...full genetic siblings; step siblings who...have grown up together. (Solicitor 6)*

In the following section, we will explore the way in which the *qualities* of sibling relationships are evaluated in legal assessments.



## 4: ASSESSING SIBLING RELATIONSHIPS

### 4.1 Introduction

Focusing on ‘assessments’ addresses two connected but distinct issues: the concepts used to consider the qualities of sibling relationships and the work involved in producing formal sibling assessment documents. The research identifies both the key *moments* in which the consideration of sibling relationships comes to the fore in care proceedings and explores the *assumptions* about child sibling relationships which inform decision making. Our review of the literature indicated that the place of formal assessments in care proceedings creates opportunities for considering important questions about what kind of knowledge is thought to be required in understanding sibling relationships and what kind of expertise is considered legitimate in making decisions about particular outcomes.

There was a strong majority view across our interview sample that ‘sibling assessments’ have become more common in recent years, with some professionals explaining the increase as resulting from a wider awareness of the significance of sibling relationships. Establishing exactly what was meant by ‘sibling assessments’ was not straightforward as there seemed to be many inconsistencies in what was described as usual practice. This inconsistency is perhaps partly explained by the fact that they have no statutory underpinning: there is no reference to ‘sibling relationship assessments’ in statute and no legal requirement for an assessment to be undertaken. The government guidance to adoption advises that agencies ‘may wish to have a formal assessment process in place to assist with the analysis and decision making’ (DoE, 2013, para 3.15), but says nothing further about such a process. Consequently, what an assessment might look like, what form it should take, when it should be undertaken and by whom, are all ill-defined and under-researched. This may be surprising given that information about the relationship between siblings will often be critical and required in order to provide courts with the necessary facts and evidential basis for the making of judgments. The widely accepted view that a sibling relationship is an important aspect of a child’s well-being means that, in order to determine what is in the best interests of a child, information about siblings is a potentially relevant factor in all decisions about that child. A key challenge for law is how to determine what weight to put on the impact of decisions on different child siblings, where their interests may point in different directions.

Information about siblings will always be necessary where a decision will result in the separation of siblings. This is clear from the statutory duties that emphasise the importance of an ideal that children be kept together (CA 89 s 22C(8)(c)). In the context of adoption, the necessity of information about the relationship between siblings is clearly required by the statutory requirement to take into account the ‘likely effect on the child (throughout his life) of having ceased to be a member of the original family and...the relationship which the child has with relatives’ (ACA 2002, s 1(4)(c), (f)). A court must also ascertain the wishes and feelings of the siblings of the child regarding the proposed adoption (ACA 2002 s 1(4)(f)(iii)). Where siblings are separated, the question of contact arises and is similarly a matter for the courts to consider, whether in reviewing arrangements proposed by a local authority or in determining applications for a contact order. Sibling assessments are therefore crucial sources of evidence in these legal contexts.

An important question to be addressed across the data is, what is the perceived *purpose* of a sibling assessment? Are assessments focused on particular outcomes or more open-ended? Are they system-focused, for example, conducted within pre-existing parameters of what is thought to be feasible and usual, or do they start from the individual child’s needs and wishes, regardless of what is thought to be realistic?

Another important question is, what knowledge and skills are thought to be required in the assessment? By this we mean knowledge in many forms:

- empirical research about experiences of, and outcomes for, siblings;
- theories of children’s needs;
- observations of the particular child and their siblings;
- conversations with the children and relevant adults;
- normative or ‘common sense’ assumptions about childhood, siblings and broader family relationships.

We start by examining how practitioners identify which siblings are to be taken into consideration. We then ask what *is* a sibling assessment? Thirdly we consider what is understood to be their purpose, what knowledge is thought to be required to conduct them and who is charged with the task. Finally, we outline some of the problems with sibling assessments, as reported to us by our interviewees.

## 4.2 Finding siblings

The first questions in our interviews were, ‘who are considered to be siblings’ and ‘how do you find out about them’? In the previous section we outlined the terminology and categorisations used to capture and distinguish between sibling relationships, but we were also keen to find out how sibling relationships are identified and recorded early in proceedings. Most practitioners seemed confident that despite the often complicated nature of sibling relationships, procedures for mapping them were adequate, most of the time.

*I think it's part of the standardised court document, isn't it, that's used nationally, so when you write an initial statement you'd be expected to do a genogram in your initial statement for court. (Social Worker North Focus Group)*

*...the SWET (Social Work Evidence Template) statement...should set out...who is in the child's family and where they fit into it, so I'd expect to know from the outset who the siblings are...(Judge 1)*

*I mean I would say by and large local authorities are quite good at getting a genogram there, particularly if there have been pre-proceedings. It might be that the genogram provided, if it's a case that's been issued without pre-proceedings, the genogram might be fairly basic but then you'd want the court to direct that a full genogram should be filed and served by such a date because, again, it's the simplest way of getting into what the family relationships are, what the wider relationships are and what sibling relationships there are. (Solicitor 2)*

Genograms are a mandatory part of the SWET<sup>27</sup> statement recommended by the President of the Family Division, the Association of Directors of Children's Services, Cafcass, HM Courts and Tribunals Service, the Department for Education, the Ministry of Justice and the Chair of the Family Justice Board, in compliance with the revised Public Law Outline (PLO) 2014, but they can be adapted by local authorities. While the SWET statement mentions the ‘sibling group’, sibling relationships are not otherwise explicitly referred to; they would be captured under ‘other relatives’. We also found that different local authorities had different systems software for mapping relationships.

*We do a visual document...particularly when it's really complex and you have got step siblings / half siblings and it's very complex. We would encourage them to do that with the family in terms of, you know, quite a big piece of work and then obviously in other documents you'd talk about...what those relationships mean to that child or sibling group. (Social Worker North Focus Group)*

While some legal practitioners claimed that the construction and reading of genograms was not within their expertise, there did not seem to be a perception of substantial problems with the process of mapping of siblings. However, as discussed in the previous section, there are siblings who are more difficult to identify, particularly if they are not subject to proceedings and not co-resident; this usually means paternal half siblings.

*You know about it at the beginning. You know what the family group is. What you don't know is the peripheral siblings. So you know the siblings that are the ones in front of you...but you don't know about dad's other kids with his partner that they are seeing on alternate weekends. Usually the kids are with mum as the main carer...You don't really at the first hearing know about the dad's children that these children are coming into contact with on a regular basis. You might know a name. You might have some brief details but the first day you don't really know about that. You just know about the subject children and any other children that are in the household. It's at the second hearing that you'll then know more about the siblings that form the family group and that's when you know about them. So first hearing you'll know about what's in the household that you're removing these children from. The second hearing you'll know a little bit more about the periphery, about what else is involved in these children's lives. (Judge 3)*

*...there's a very formulaic way of finding out about these children, it's by the names. So if there's a different name or it's a half sibling, there's been a different mother, that way sometimes you will find out because*

<sup>27</sup> <http://adcs.org.uk/care/article/SWET>

*during the course of proceedings the local authority will be making enquiries about, again, it is usually the father in that context where you find out about these surprise siblings you didn't know about...The name might be different and so it might take a while or it will have happened in a different borough so the borough you're in a proceedings with won't have picked up and they might do a wider search or sometimes the mother will say, "Oh I think he's got other children," so you'll go and look that way. (Barrister 5)*

Older siblings who are no longer living in the household may also take more time to identify.

*You would know that siblings existed either because they are actually subject to the case or through the social work statement especially if they are, you know, still children. You might or might not know about older siblings who've perhaps left the family home. They might well of course present themselves potentially as alternative carers. (Judge 5)*

As discussed in Part 3: Terminology, 'blood' remains significant in the delineation of sibling relationships but is not absolutely determinate.

*Generally it's, yes, it would be siblings by birth so, again, you'd be looking at full siblings, half siblings and I'm aware of the notion of social siblings. You wouldn't get that on a genogram. That would take further investigation and a better understanding of family relationships and networks. (Solicitor 2)*

*I'd expect to always say, "What children have you got?"...obviously you wouldn't forget you had a child, but sometimes...it's almost as though they're not seen as relevant to that set up, so there might be some step siblings. And it's more step siblings that aren't seen as part of this family...If the new family's over there, they're not seen as siblings to this family and possibly they don't have much of a relationship. (Solicitor 7)*

### 4.3 What is a sibling assessment?

In the interviews, the most common method of assessment referred to was a 'Together and Apart' assessment, also spoken of as the 'BAAF' assessment, by which the interviewees appeared to mean a good practice guide called *Together or Apart: Assessing Siblings for Permanent Placement* written by Jenifer Lord and Sarah Borthwick. The guidebook, published by the British Association for Adoption and Fostering in 2001 and 2008, includes a checklist for assessing children's relationships with their siblings. However, from the practitioners' descriptions of sibling assessments, there did not seem to be a universal model for practice; different local authorities were reported as using adapted versions of 'the BAAF' or various other procedures. Although the BAAF *Together or Apart* guidance and checklist has clearly been highly influential, we cannot presume that this is what is being consistently employed in practice. (A substantially revised and extended good practice guide was published just as this research was concluding: *Beyond Together or Apart: Planning For, Assessing and Placing Sibling Groups* by Shelagh Beckett, published by CoramBAAF (2018)).

On analysing the transcripts, it became evident that without requesting the actual proformae or protocols for sibling assessments used in different locations, it is difficult to establish exactly what constitutes a 'sibling assessment'. While in some regions professionals described 'Together and Apart' assessments as standardised in their practice, in others, professionals seemed unfamiliar with the tool, reporting that other forms of assessment were in operation or that they were unsure what was common practice. A picture emerges of considerable variation. What we can conclude is that there is no consistent national method for assessing sibling relationships currently embedded in social worker training or in practice. As we were reliant on the reports from varied professionals, with roles in different parts of care proceedings, in different regions, it is not possible to establish patterns of practice, however, we can provide an overview of the diversity of presumptions and practices in operation.

We asked specific questions about sibling assessments in both individual interviews and the focus groups, but the subject of sibling assessments often emerged spontaneously when we asked questions about who might be considered as a sibling. Inconsistencies in what constitutes a sibling assessment were particularly apparent in our social worker and IRO focus groups. The social workers quoted below worked in teams across the North of England and had differing experiences of, or ways of describing, sibling assessments.

*SW1:...we use a Together and Apart assessment where we really analyse like the different relationships...so lots of observations of contact, informal contact and all of those things and foster carers' observations...that's kind of the tool that we use.*

SW2:...I'm not aware of that format...the one that I'm used to seeing...is one where you're effectively comparing one child to their relationship with another child and then you effectively ask the same questions about Child B to Child A...It doesn't look to me like a particularly scientific tool; it's a guide to help you with your conversations about how these kids relate to each other...It's essentially a questionnaire really. (Social Worker North Focus Group)

Other professionals had very different expectations of sibling assessments, as demonstrated by this solicitor and a judge:

...it will be a psychological assessment of each of the children, of the parents and then a question about diagnosis, prognosis, timescale for change, placement, contact and will encompass the sort of Together and Apart work, that's what you would expect. (Solicitor 10)

Yes, I've heard of those [Together and Apart Assessments] but I don't think I've ever seen one. (Judge 5)

While the need for standardisation in practice seems self-evident, there may be a tension between professionals using tools, instruments and checklists, and their ability to make deeply informed and sensitive assessments, capable of reflecting the particular circumstances and best interests of specific siblings groups.

### Greater frequency now

There was a strong majority view across the sample that sibling assessments had become more common in recent years. This guardian estimated that there had been an increase over the past 2 or 3 years.

I mean when I first started doing my job as a social worker and as a guardian, 'what is a Together and Apart assessment?' Whereas now that's a matter of course. I don't remember four years ago, as a guardian, reading a Together and Apart assessment. (Guardian 2)

Some respondents attributed the increase to a raised awareness of sibling relationships across the system, but again, inconsistency was reported;

It is more common than it used to be for people to appreciate the need for Together and Apart assessments but the quality of those varies hugely. (Judge 1)

A barrister agreed that sibling awareness had resulted in greater demand for assessments:

...I think because of an increased consciousness that the court has to sort of take a view about what to do with siblings, there has been something of a tendency in recent years for the court to direct that there be what's called a Together or Apart Assessment...(Barrister 2)

A guardian suggested that a shift in presumptions – that siblings should be kept together – has affected practice.

There have been very, very big changes...and siblings; you just didn't think about that relationship particularly in the past whereas now I think it has come up into the consciousness more of judges, as I've said, and for social workers as well...I think the presumption now is to maintain if possible and to have very good arguments for separating children. (Guardian 3)

A social worker attributed the increase in sibling assessments to a stronger emphasis on 'permanence':

Now there is more emphasis...even at the PLO stage, on doing that sibling assessment if you know that potentially a sibling group could end up being split permanently... permanence is, you know, a massive drive in terms of very early on...even at the stage of doing it from a referral, you need to be sort of thinking about permanence if you know, what the options are for that child. (Social Worker North Focus Group)

The reported increase in sibling assessments may be straightforwardly the result of greater 'sibling awareness', however, the comment above indicates that other drivers are likely to also be at play. Exploring what are said to be the purposes of sibling assessments can help us to consider why they might have increased.

## What is the purpose of a sibling assessment?

What emerges from the cases is that assessments of the quality of sibling relationships are seen to serve different functions: they can provide evidence to support a finding of 'significant harm' in care proceedings; they can inform decision making about types of placement and contact between siblings; or they can be treated as part of the evidence necessary to override the general principle that siblings should, ideally, be kept together.

## Evidence of significant harm

One purpose of 'assessments' is that they can provide evidence to support a finding of 'significant harm' in care proceedings. In some cases, failure in parenting is identified as the cause of 'negative' features in sibling relationships. Three typical descriptions found in the case law are:

*The impact of this parenting on the children was noticeable. Concerns were expressed about their aggression and violence towards each other of hitting and nipping...(Rotherham Metropolitan Borough Council v Ms W (the mother), Mr T (the father), The Children (Represented by the Children's Guardian Ms Felicity Berryman) [2015] EWFC B115 (Fam) at para 16, emphasis added)*

*There is an intra-sibling relationship and co-dependence, with the two older children being anxious for and protective of their younger siblings. That is probably a reflection of their home circumstances. (X County Council v AJBM, ADBM, LBM, JBM, KBM, EBM (the children) by their Guardian [2016] WL 00826273 at para 40, emphasis added)*

*...both continue to need reparative parenting. At times they attack each other for no apparent reason. (In the matter of J, K, L (Children) [2016] WL 01253997 at para 105, emphasis added)*

A noticeable feature of discussions of harm and damage to children were distinctions made between siblings on the basis of age. These distinctions can have ramifications for the outcomes recommended for children within a sibling group. Typically, the older sibling is talked of as having been more 'damaged' by their experience in the parental home. Parental neglect can be read as having become 'embedded' in the older child:

*if you take A, B, C, D and E now that we've got the psychological report, you can see that the oldest child has been much more seriously adversely affected by the deficiencies in the parenting than the younger child for obvious reasons; he's been exposed to it for very much longer. So they have a shared experience but also a very different experience. The youngest one...was removed at birth so the youngest one has no experience and then as you progress up between the oldest child and the youngest, you've got three in the middle who are affected in different degrees. (Judge 4)*

We can see how, through parental 'failure', a family group moves from being considered as a unity to being reconceptualised as a more fragmented collection of very different children with conflicting needs and interests.

*One of the worst tensions, I think, is with non-consensual adoption and the idea that if you have a very wide sibling group in terms of age, the interests of a tiny baby who may have been born during the course of proceedings and much older siblings who have already been damaged by the harm they've suffered which brings them before the court, the tensions will be for the older children to lose that baby who is part of their constellation of family relationships and for the baby who may be able to be adopted and given a completely fresh start, that is going to be argued before me quite powerfully and there'll be quite a tension there about what is in each of the children's interests. So those are sort of some of the ranges of problems that I'm facing. (Judge 2)*

While there was great sympathy for the older child, their perceived vulnerability is dealt with in a very different way to the vulnerability of their younger sibling.

*...it's a general point I suppose on care proceedings that children who are relatively older are often extremely vulnerable themselves and so I think often older children can get a really bad deal, you know, because it's often felt, 'oh they're too damaged' or, you know, they're too kind of set on this path whereas with younger children, if you get in early, you know, you can intervene more effectively. (Barrister 2)*

In one unusual case, an older child was considered to be less 'damaged' than the younger siblings because his grandmother had mitigated the parental failure.



*So the youngest boy, his neglect was quite different to the older boy because he was the third child born so left mainly in his cot. Whereas the older boy at the time, he had a better relationship with his grandmother because he was the first born. So he had quite a close relationship with his grandmother, more so than the younger child. (Social Worker South Focus Group)*

Some practitioners said that one of the problems of the system is that the focus early in proceedings on establishing that parental behaviour has reached the threshold of significant harm leads to a lack of attention to the relationships between siblings<sup>28</sup>. But it is also possible that in cases where parental failure has been ‘read into’ the individual children’s behaviour or ‘read off’ from negative sibling behaviour, that the differential assessments of the particular siblings at the threshold stage legitimates their separation and diminishes the chances of contact between them.

The wider sociological literature about siblings cautions against reducing sibling behaviours to the outcomes of parental behaviour, partly because children’s relationships are complex and have their own dynamics, but also because the thresholds of what is or is not a ‘normal’ level of conflict or violence within sibling relationships is very unclear (Edwards et al, 2006). Later in this section, we will discuss our finding that although the use of psychological ‘diagnoses’, such as ‘attachment’, ‘trauma’ or ‘parentification’ is common in sibling relationship assessments they do not lead automatically to particular routes in care planning.

### Informing decision making or evidence of decision making?

Whether a sibling assessment is a process of information gathering, of analysis or of producing a particular document was frequently unclear. For some, it is an essential tool to *inform* decision making, crucial to the avoidance of overly simplistic assumptions:

*...there’s been more emphasis on it, more local authorities are thinking, ‘we need to kind of provide our analysis as to why we’re doing this’, whereas perhaps before it might have just been shoehorned through without proper analysis. So I think people are more alive to those issues rather than just saying ‘oh right, they’re seven and below, well they’ll definitely be adopted’ and that will be that. And now they have to provide the analysis and to talk about, you know, the enduring relationship and the experiences that they’ve shared together and how important it is. I think because now you have a framework especially with new social workers and new guardians coming through, they can think about it a bit more clearly. (Solicitor 3)*

For this judge, the purpose of a sibling assessment was to provide a recommendation, based on the analysis performed:

*...we do expect a recommendation at the end. Yes, you’d expect that. (Judge 1)*

The case review revealed that judges are sometimes critical of the quality of sibling assessments, for example, in one case a judge criticised a local authority for undertaking sibling assessments ‘without discussing the children and their attachments with their parents, or indeed observing the children together’ and failing to undertake ‘a full and fair sibling assessment in particular because they were undertaken without sibling contact being observed’ (*Hampshire County Council v M and others* [2014] WL 10653776, HHJ Horton at para 135).

The absence or inadequacy of a sibling assessment was sometimes regarded as grounds for delaying proceedings beyond 26 weeks. In one such case concerning a proposed separation of a 7 year old from his 18 month old sibling who had been together for 14 months in foster care, the judge held that:

*The LA has done little to assess the likely impact of separation upon K and has given even less thought to the support she is likely to need to get through what I am confident would be a very difficult and distressing experience for her. (Re K,D (Children: Care Proceedings: Separation of Siblings) [2014] WL 4081297, Bellamy J, at para 160)<sup>29</sup>*

<sup>28</sup> See Bainham (2011) for discussion of the implications for siblings and half-siblings where there is uncertainty in care proceedings concerning which parent has been the perpetrator of harm.

<sup>29</sup> See also, *Re A, B, C, D and E (Children: Care Plans)* [2017] EWFC B56; *Re D (children)* [2014] EWFC B57 [2014] WL 2652617; *Leicestershire CC v D* [2014] WL 44233328.

In an interview, a judge recounted delaying proceedings so that a psychologist could be instructed to perform a sibling assessment after the local authority report was considered inadequate:

*There was a Together and Apart assessment which was really not a Together and Apart assessment, it was hopeless. And there'd been no real evidence before the court as to the potential impact on all of the children of the ultimate configuration of their placements and the nature of their placements and so I adjourned it off for a psychological assessment. (Judge 4)*

Other professionals recounted that the absence or inadequacy of a Together and Apart assessment could be used by parents' or children's representative as one route to challenge a care plan.

*...from purely like a lawyer's point of view, if I know that a social worker on one of my cases is going to give evidence at final hearing that's contested, then you're giving a cheap shot away to the parents' lawyers if you've not done that assessment because...the obvious question to the social worker is, 'well, you're saying that this child can be adopted but the siblings are going into foster care. What impact is that going to have on the siblings?' And then the social worker will start giving an answer and go, 'we've not assessed that'... So they need to be able to justify what they're saying is evidenced. (Solicitor 9)*

The quote above is from a local authority solicitor and is reinforced in the responses of lawyers acting for parents; challenges based on the absence or inadequacy of a sibling assessment were seen to strengthen the challenge to a care order. They might call for a sibling assessment if one had not already been commissioned, challenge the conduct and content of a sibling assessment or demand an alternative sibling assessment.

*...we have historically challenged local authorities where we felt their Together assessment...there isn't one so we've challenged them to say this is a vitally missing link...(Solicitor 6)*

However, from the accounts of other professionals, the assessment seemed to serve as *evidence of* decision making rather than a *tool for* better decision making:

*If there's a care plan of separation...because that separation is not something that's taken lightly, it has to be explained and justified...which is where the Together and Apart assessment comes in. (Guardian 2)*

*...at the end when they say 'oh crikey...we are now looking at permanence', 'we've got five children, we're never going to get those five adopted together'. And suddenly it's like 'ooh, right, we've got to do the assessment'...(Guardian 4)*

## Overriding the 'together' presumption

With only a few exceptions, sibling assessments were described across the interviews as 'common' primarily in cases where separate placements were being considered for siblings. Rather than being open-ended assessments of the quality of the sibling relationship they are more commonly understood to provide evidence for a 'together' or 'apart' recommendation. A judge clearly stated that separation is key to the sibling assessment being considered essential.

*If they're not contemplating it, I don't need to know it. My view is, you know, if you're going to keep a family unit together, that's what's best, that's my starting point, if that's what you're doing, I don't want to know...if you're contemplating the sibling separation, you need to do the assessment. (Judge 3)*

Other professionals confirmed that assessments are only thought to be necessary in the event that separation of siblings is likely:

*We...tend to only file a formal document where there is an adoption assessment. (Solicitor 3)*

*...I mean if that's what their care plan is, to separate the siblings, then they need to provide a Together and Apart assessment to set out their analysis. (Solicitor 5)*

*...there comes a point in care proceedings where you know that these siblings could be separated and that's when you need to do that assessment. (Social Worker North Focus Group)*

In the case law, the most commonly-reported purpose of sibling assessments was to weigh up the benefits of a 'permanent' adoptive placement against the 'loss' experienced through separation from siblings. This type of

decision making often involved the language of ‘sacrifice’ to describe what would happen to the sibling relationship in the pursuit of ‘permanence’ for the child who is to be adopted. In the case below, a psychologist had been asked to review a sibling assessment carried out by a local authority and to conduct their own assessment in order to determine whether siblings could be separated by adoption:

...a Chartered Clinical Psychologist...assessed all three children. Dr [name redacted] was asked to report on the children’s relationship with each other...in essence she identifies the difficulty of sacrificing the direct sibling relationship to achieve the outcome of long term permanency by way of adoption for Y and Z. Notwithstanding this disadvantage she remains of the view that to achieve the best outcome for Y and Z, the sacrifice has to be made. (*Rotherham Metropolitan Borough Council v Ms W (the mother), Mr T (the father), The Children (Represented by the Children’s Guardian Ms Felicity Berryman)* [2015] EWFC B115 (Fam), para 88)

In a similar case, a social worker conducted the assessment of five children:

She concluded sibling relationships were strong and important...She...recommends the two older children move in together soon and are placed for adoption together...but accepted in an ideal world all five of them would be together – practicality determined her plans...She was clear if the children were separated it was imperative they should stay in touch though if some of them remained in foster care and still seeing their parents that might be much more difficult, since adopters might be anxious about that. (*A Local Council v B, C, Five children (by their Children’s Guardian)* [2017] WL 03634997, HHJ Williscroft at para 52)

In both of these cases the assessments had the purpose of legitimising separation of siblings through adoption. While the assessments of the sibling relationships are not negative, the goal of ‘permanence’ for one or more of the siblings outweighs the presumption that siblings should be kept together. We can also see here a dominant theme in which ‘practicality’ leads towards the separation of siblings on the basis of age. This will be discussed later in relation to the division of children into ‘sib-sets’.

One Local Authority solicitor described how his employers had instigated almost routine Together and Apart assessments for siblings;

...if you’ve got siblings then I would always be saying a sibling assessment...when I say it’s done in all cases, if I was to go through my files I’d probably find ones where it wasn’t done, but that’s just because it was so obvious. But generally speaking we would do one in any event because otherwise from a care plan point of view how do you know you’re making the right decision if you’ve not actually formally looked at that and said, you know, these two / three / four kids get on well together? It’s necessary to inform the final care plan...We...nearly always do sibling assessments in cases where you’re looking at a sibling group and you would always do them if you’ve got a large sibling group... (Solicitor 9)

But the purpose of Together and Apart Assessments was still primarily understood to be providing evidence in support of separation.

I mean quite frequently in this sort of work when you have a sibling group, the baby and older kids, you do end up separating siblings...it’s sort of accepted, isn’t it, that sibling relationships can be some of the most enduring and important relationships and to just sort of interrupt that so dramatically you would hope that it’s been done on a good evidence base. (Solicitor 9)

Another local authority solicitor described in more detail how sibling assessments come to be carried out, emphasising the sometimes last-minute realisation that a Together and Apart assessment was necessary and their role as evidence to support separation.

The procedure in this authority is that effectively the care plan has to be approved by the service manager. The case progression officer will also have an overview in terms of the discussion...So by the time it’s come to us it’s gone through the social worker, the service manager, the case progression officer, comes to legal usually at four o’clock when it’s due to be filed...So you look at it and you see, okay, you’ve got three children here. The youngest is four. Care plan for the youngest is adoption. The other two siblings potentially long term foster care. So you’re looking at it in terms of a Together and Apart assessment; has that been done because you’re not going to get the adoption without that. (Solicitor 3)



## Who carries out a sibling assessment?

Across the sample we found varying views in what was understood to be the work required for a sibling assessment, but it was generally accepted that it was the job of social workers. This is a finding that would appear to reflect acceptance of the new rules which challenged the practice of 'routine acceptance' of the need for external experts and confirmed the 'sufficiency of a good quality social work assessment to provide the evidence required' (Brown et al, 2015: 41).

For a number of professionals a good quality assessment would ideally entail observation of contact between siblings, talking to teachers, discussions with foster carers and direct work with the children, but there was recognition that this was not necessarily what was possible in practice. In particular, it was noted by many that social workers and Cafcass guardians no longer have the time or resources to conduct an assessment in a way that they considered satisfactory. And there was also recognition, which again supports other research findings, that 'not all social workers have the same level of necessary skills or confidence' (Brown et al, 2015: 41).

The ideal Together and Apart assessment was described by one judge as follows:

*It will give me, I think, a thumbnail picture of each child in terms of their character...are they retiring, are they out-front, are they aggressive...So all the positives and negatives, if you can call it that. The different vulnerabilities and attributes of each child and how they then interact with their siblings and how they see each other...something that gives me a feeling about how the children feel about each other, so getting them to talk about each other. So they'll be seen individually and then they'll, I hope, be observed as a group so you can see how they interact and I'll get a picture of how they are together and that's what I would call a good Together and Apart assessment...and I've seen reference to research on the importance of the child's lived experience together and about how the sibling relationship outlasts a parental relationship so that kind of general research. (Judge 2)*

But a solicitor questioned the quality of many sibling assessments:

*I just think the quality of the Together and Apart Assessments I see for example is often wanting. They're superficial in my view....I'm not sure how much rigorous analysis has actually occurred. (Solicitor 6)*

The same solicitor recalled a recent example of a high quality assessment, but which was conducted by a psychologist:

*There's a superb high quality assessment...it cites the work of Lord I think it is, of about 2009, and it takes those factors that him and his colleagues put together about looking at keeping children together or apart and it actually applied that to the evidence base in the particular case. So I do think there is a greater appreciation and knowledge of sibling relationships and I think those representing children are testing those more now. (Solicitor 6)*

While sibling assessments primarily were seen as a task for social workers, usually the child's social worker, other expertise, most often of child psychologists, was sometimes deemed necessary. However, disputes reveal a lack of consistency in determining when independent or psychologist expertise is required. In one case a judge strongly disputed the necessity of instructing a psychologist on the basis that he was 'wholly unconvinced' that it was:

*necessary to assist the court to resolve the proceedings...that there was nothing exceptional or unusual about the questions that it was proposed should be put to the psychologist and that the issues arising were those: 'commonly assessed, teased out and ultimately decided upon by judges hearing public law cases'. (Re R (Children) [2014] EWCA Civ 1110 at para 14)*

Overruled on appeal, Ryder LJ ordered that the instruction of an expert was necessary according to the rules. However, in other cases, which we examine later in the context of adoption, judges reject evidence by child psychologists on the basis that the social work evidence is more 'realistic' about placement options. Consequently it appears that questions about who should undertake an assessment reflect the lack of clarity about their purpose and wider debates about the inherent role of expertise (Hill et al, 2017).

## 4.4 Knowledge

Unpacking the assumptions about sibling relationships which are at play in the legal system involves exploring the kinds of knowledge thought to be necessary to inform sibling decision making. There are many forms of knowledge evident in our data, some are referred to explicitly, such as empirical research about siblings and theories of children's needs. This knowledge tends to be associated with particular expert groups such as sociologists, psychologists or psychiatrists. Other forms of knowledge might be categorised as normative or 'common sense' assumptions about childhood, siblings and broader family relationships. These are often implicit but are sometimes attached to expert language and concepts in order to lend them greater objectivity. When it comes to assessing sibling relationships there is a third category of knowledge which is specific to the particular child or sibling group and emanates from the experiential knowledge of caregivers or from the opinions of the children themselves.

### Empirical research about siblings

There were few references to empirical research about sibling relationships in the case law and the practitioner interviews, but the need for such evidence was sometimes remarked upon, particularly by judges. For example, in a private case where, unusually, the separation of siblings was being considered, Ryder LJ complained that 'this court has not been taken to any of the research studies that consider this issue' and remarked that 'generalisations are dangerous, the intensity of sibling relationships can be very different' (*Re K* [2014] EWCA, Civ 1195 at para 40). In a case of two girls being placed for adoption the judge referred to a social worker's citing of empirical research about better outcomes for siblings placed together as well as a sibling assessment's positive view of a together placement:

as noted by the allocated social worker in her sibling assessment at E29, "research also indicates that siblings placed together do experience better outcomes than if they were placed in separate placements". (*SCST v D & W* [2018] WL 00691623, HHJ Owens at 7)

In the judge's focus group, another judge said that in adoption cases, they would want to see 'the statistics of how many 11 year olds are placed, what's the likelihood? I would expect to have some theory' (Judges Focus Group). However, this quote might also indicate a degree of confusion about the differences between empirical research, locally-generated statistics and theory.

### Theories about siblings

Far-outnumbering references to empirical research were invocations, explicit or implicit, of psychological theories, most commonly, 'attachment theory'. An unusually explicit reference to attachment theory was found in a Court of Appeal judgement in 2015 which determined whether two children, who had effectively lived for all their lives with a local authority foster carer, should be adopted by her or placed with a paternal aunt who was a total stranger to them. In the judgment McFarlane LJ suggested that recent neuroscientific discoveries 'proved' John Bowlby (the 'father' of attachment theory) to be right.

In more recent times the prescient observations of Ormrod LJ, which were made at a time when the early work of John Bowlby and others on 'Attachment Theory' was available, have been borne out by the enhanced understanding of the neurological development of a young child's brain that has become available, particularly, during the past decade. As a result, the importance of a child's attachment to his or her primary care giver is now underpinned by knowledge of the underlying neurobiological processes at work in the developing brain of a baby or toddler. (*Re M'P-P* [2015] EWCA Civ 584 at para 49)

The judge proceeds to link the theory to the law:

In the context of 'attachment theory', the wording of ACA 2002, s 1(4)(f), which places emphasis upon the 'value' of a 'relationship' that the child may have with a relevant person, is particularly important. The circumstances that may contribute to what amounts to a child's 'status quo' can include a whole range of factors, many of which will be practically based, but within that range the significance for the child of any particular relationship is likely to be a highly salient factor. (*ibid*, para 50)

The relevant passage was also cited in a later case concerning a birth family challenge to the adoption of a child that was settled in a prospective adoptive home (*Re W (A Child)* [2016] EWCA Civ 793, para 67). Concern for

'status quo' arguments are particularly pertinent in the context of there being more such foster-for-adoption placements.

Claims that attachment theory has been proven through developments in neuroscience and that early life experiences become 'embedded' in brain structures are, however, subject to challenge. A highly contested debate about whether claims about infant brain development can legitimately become assumptions to inform care proceedings ensued from a Department of Education report published in 2013 with a foreword by the then President of the Family Division, Sir Nicholas Wall (Brown and Ward, 2013). The report was critiqued at the time by, amongst others, Featherstone, Morris and White (2013) and White and Wastell (2013) and they have gone on to substantiate their counter-arguments in lengthier works (Wastell and White, 2017; see also Gillies, Edwards and Horsley, 2017).

We can see in the judgements cited above the expansion of claims about the child's 'attachment' since Bowlby's first research, from focusing on the mother, to the 'primary care-giver' and now to 'relevant persons', which could include siblings. However, as with the contestation of neuroscientific claims, the legitimacy of this expansion of attachment theory also has its challengers.

### Attachment: Applicable to siblings?

This contestation of knowledge was evident in our interviews, where there was considerable confusion and disagreement over whether 'attachment' is a useful lens through which to view sibling relationships. It was expressed particularly clearly in a guardian's description of a case in which three half siblings were to be separated:

*...the local authority had never done a sibling assessment despite being requested by myself and ordered by the court. They've never got round to doing it. So in the end we had to commission someone to do it...and that was done by a psychologist and he was very dismissive of the notion of attachment on the basis not that siblings don't have a strong and important relationship, he wasn't dismissing that, but the concept of attachment wasn't applicable to a sibling relationship. And I had read somewhere, and I can't remember whether it was Research in Practice or somewhere, I had read people referring to siblings being attached and being able to provide that sort of care and that nurturance and that feeding into resilience but he sort of demolished that argument entirely saying, you know, they had a relationship but actually all three children had needs of their own...(Guardian 4)*

The centrality of 'attachment' to sibling decision making seemed clear to many of our interviewees, and, indeed, it reflects official guidance, for example, the government guidance recommends that professionals consider whether siblings 'have formed an attachment, and if so the nature of that attachment (secure, insecure or otherwise)' (DoE, 2013, para 3.16) when deciding whether siblings should be placed together or apart. The need to assess 'the quality of attachment between siblings' is also referred to in Lord and Borthwick's BAAF 'good practice guide' (2014: 9). Others were far more sceptical, sometimes drawing on the authority of psychologists to refute that children's emotional bonds should be referred to using the language of attachment. This tension between expert claims emerged repeatedly in the data.

Echoing the official guidance, some interviewees were very certain that there is such a thing as 'sibling attachment'.

*Well there's a secure attachment or insecure attachment...I don't think they use the word avoidant in that particular scenario but it is whether it's secure or not secure...Between the siblings...(Solicitor 5)*

*IRO: And children's attachments aren't just about an attachment to a main caregiver, you know, it's anybody who is going to be a key positive influence in that child's life otherwise they'll make negative attachments and go off and do whatever.*

*JM: And that could be siblings as well?*

*IRO: Absolutely. (IRO North Focus Group)*

A few professionals referred to the sibling assessment as a 'sibling attachment assessment':

*I work on a safeguarding team now and I did a sibling attachment assessment and I had four siblings and they had been separated...So following that sibling attachment assessment, that led me to the care plan that I wrote for court which was agreed recently. (Social Worker North Focus Group)*

However, others, such as this judge, were less certain that the concept was applicable to siblings.

*I'm probably misusing that word because I don't know whether siblings have attachments to each other. They have attachments to parents but I don't know if they have...(Judge 2)*

A solicitor was more certain that attachment was only relevant to the parent-child relationship.

*I mean my understanding is that attachment is between parent and child or caregiver and child. It's not so much between siblings. (Solicitor 10)*

Another judge reported that sibling attachment is talked of by professionals, but like many other interviewees, was sceptical of the correctness of its application, not just to siblings, but more generally.

*Oh attachment is one of these words that's bandied around quite a lot and I'm not sure that it's always bandied around by people who know what they're talking about either!... I think it's one of those sort of technical terms that's escaped into the wild and is used probably in ways that the specialist wouldn't necessarily agree was correct. But, yes, you do hear that and you will hear about it in connection with siblings as well as parents...(Judge 5)*

A solicitor expressed a similar concern:

*People bang on about attachment a lot without actually knowing what it means because it has got a technical meaning and people use it, I think, very freely when they probably mean relationship...Because attachment has got a technical term and people will use it as a sort of, 'they're quite fond of each other'... people might use attachment but often psychologists sort of go, 'stop using attachment' in reports... 'attachment does not mean what you are trying to make it mean'. (Solicitor 7)*

These reflexive comments resonate with Piper's analysis of the relationship between child welfare science and law and in particular that, 'once ideas based on scientific research have been transferred to the discursive context of law, they become largely immune to scientific "testing"' (2000: 266). It is frequently unclear whether 'attachment' is being used as a reference to a specific psychological theory or simply as a synonym for 'bonds', 'connections', 'relationships' or even 'love'. Consequently, while the authority of attachment as a psychological theory may be invoked by some as a way of determining decision making in particular directions, there are limitations to its ability to operate in this way, especially when it has floated free from specialist expertise.

A key moment in which 'attachment' is talked about is in the context of the 'permanence' versus 'loss' dichotomy (discussed further in Section 6.2). It seems that implicit and sometimes explicit within 'permanence' arguments are constructions of the younger child's need and ability to form 'secure attachments' with a new parent figure; but these new attachments are weighed against existing 'attachments' between siblings. A barrister expressed the presence of competing attachments very clearly:

*You know, they'll say, 'Well baby Charlie needs a permanent placement, security',...and I will say, 'Well, what about Robert? Robert's not going to forget he had a baby brother. How do you explain this care plan to him?...You know, they're very, very attached' and I say, 'How do you reconcile the fact that it might be okay for this little baby who may not be so aware, but what about him?' And that's often where you just... they [social workers] look at me like...And, again, often it's like, 'Well we see the point you're making but the reality is the care plan is providing for indirect contact...' (Barrister 5)*

In a recent case the judge spoke of three siblings being 'mutually very well attached' and that:

*The local authority and the guardian accept – and, indeed, both aver – that there is a very good, natural, healthy and enriching relationship and two-way attachment between C and his sisters. They naturally play together and interrelate as siblings, and the elder sisters are attentive to, and caring of, their younger brother. In simple human terms, they all love each other. (Kirklees Council v LS, TL, [2018] EWFC 12, Holman, J at para 36, emphasis added)*

But the sibling 'attachments' are weighed against the younger boy's reported ability to 'form good attachments' with a new adoptive parent or parents, evidenced by his 'good attachments' with foster parents:

*The local authority and the guardian acknowledge that it will be a great loss to C, as well as to his sisters, if those attachments and that relationship are broken, but the local authority and the guardian both say*

very firmly and strongly that that loss is strongly, and not marginally, outweighed by the great advantage to C from adoption of permanence, and the many disadvantages of continuing for 15 or more years as a long-term foster child within the care system. (*Kirklees Council v LS, TL*, [2018] EWFC 12 at para 36)

Despite the importance attributed by many professionals to ‘attachment’ as an ‘expert’ concept describing a foundational developmental need, a younger child’s need for ‘permanence’ was nevertheless judged to override an older child’s ‘attachment’ to his or her sibling. By way of contrast, in an unusual case, McFarlane LJ rejected an appeal against a judge who had held against separation through adoption for a group of siblings:

He found that they had strong attachments to each other and equally that they had strong attachments to the foster carer with whom they had been for a year. (*In the Matter of S-L (Children)* [2017] EWCA Civ 2333 at para 16)

One of the problems with applying ‘attachment’ theory to sibling relationships was that while many professionals clearly felt it to be a useful tool to describe bonds between siblings, there was less clarity in its meaning and implications for sibling placements. Therefore, descriptions of sibling ‘attachments’ did not seem to serve as principles to guide decisions regarding sibling separation or sibling contact. Within one case, separate ‘sibling attachment assessments’ contradicted one another:

The initial assessment indicated a lack of sibling attachment. The updated report concludes that there is a good sibling relationship established between AR and AP. (*BFC v R & P* [2015] WL 1651352, HHJ Owens)

In an interview with a guardian, a case of separated siblings (9 years and 1 year) was described at length.

*...in the service of what they wanted to achieve, they seemed to want to downplay that there was an attachment between these children...I mean we don't often talk in terms of attachment between siblings... they were using the word attachment, you know, in exploring the relationship with the foster carer she said, 'Oh yeah, I'd class them as being attached. This is what they do. They play...You know...The older child's very loving towards the baby. She was very responsive to the older sister. You know, they know each other.'* (Guardian 5)

Although ‘attachment’ as a concept is brought in to help guide assessments of the needs of individual children within sibling groups, it seems to struggle to resolve the fundamental tension between the child as an individual and the child as a member of a sibling group, whose needs are considered to diverge. Rather than resolving tensions, they seem to be reproduced as competing ‘attachments’, but with those between siblings afforded less weight than those between future caregiver and child in cases where separation through adoption was recommended.

### ‘Permanence’

Related to the concept of ‘attachment’ is the concept of ‘permanence’, which seems to have a ‘commonsense’ and legal meaning rather than a theoretical one, but is sometimes related to claims of empirical evidence of what is in the best interests of the child. More often however, it serves as an assumption, most notably in age-based decision making about fostering and adoption.

For the younger child, the pursuit of ‘permanence’ through adoption is a key driver of age-based decision making with foster care cast as problematically unstable relative to adoption.

*Well I would always myself, if there is no alternative in a Re B sense, be going for adoption for a tiny child rather than fostering obviously because of the terrible instability of foster placements, the fact that foster carers just aren't committed in the same way, can't be, and there are changes of social worker, the child builds up a relationship with one person, they move on, it's terrible... (Judge 2)*

*I mean if you've got a baby, like a seven month baby with older siblings, you know, siblings say from the age of eight upwards, you can justify reasonably easily, if the evidence is there to say the child should not be cared for by the parents, you can justify for a seven month old child adoption is quite clearly going to be a preferred care plan... (Barrister 1)*

The younger child’s interests are understood to be for ‘permanence’; achieved in a new parental relationship, ideally replacing the birth parents through adoption. Presumably it is not that the older child is thought to have a lesser need for ‘permanence’ but rather, that it is assumed that replacement parents are not available for them,



indicating that pragmatic or 'realistic' considerations are actually underpinning what appear to be psychologised conceptualisations of interests or needs.

The prioritising of 'permanence' across a sibling group allows the younger child's interests to be explicitly separated from and prioritised over the continued existence of the sibling group or the needs of the older child for a normal relationship with his or her siblings based on co-residence or extensive contact.

*...for a seven month old child adoption is quite clearly going to be a preferred care plan even though the older siblings would be affected by that. (Barrister 1)*

*Well I mean generally if you're dealing with a new...not a newborn baby by this stage but say a child that's under a year or 18 months old, so chances are they will have been in foster care for a portion of their life as well, so they've not always lived at home with parents and siblings together then in my experience the sibling assessments normally conclude that whilst a sibling relationship is important, it shouldn't stand in the way of baby having a chance to have a life, you know, permanency, secure family versus the prospect of being in foster care. I don't think I've ever had a situation where a sibling assessment has concluded that a baby should be kept in foster care just because of the strength of a sibling relationship. (Solicitor 9)*

It was generally stated that differing, age-based care plans would outweigh concerns about keeping siblings together. The overwhelming impression is of a presumption that babies will be moved towards adoption while toddlers and young children were on a trajectory towards becoming 'unadoptable'.

*It's more problematic, say, if you've got a three / four year old with older siblings, so the youngest child is on the cusp of adoption, then I think the arguments about sibling relationships, particularly if you're acting for a parent in opposing adoption, then I think that you certainly employ those arguments more. (Barrister 1)*

As the 'adoptability' of the younger child is a quality which diminishes over time, an urgency is introduced to sibling decision making. 'Adoptability' is, of course, not a quality embedded in the child's personality or behaviour, but a manifestation of the realities of finding adult carers.

### Who is qualified to speak of attachment?

The tensions over attachment theory are reproduced in questions about which professionals have the expertise to work with or speak of attachment. A barrister expressed the view that while attachment as a concept is more talked about 'in the system' than in the past, there was an issue with which professionals are qualified to use it:

*...I mean that's looked at quite a lot in care proceedings, although everyone's quite wary about using the word attachment...Well, I mean psychologists use it a lot and psychiatrists when they're assessing children and the relationship between siblings and between children and their parents. You tend to find barristers being quite critical of social workers using the word 'attachment' because obviously their training doesn't necessarily equip them to talk about attachment. I think attachment or...I think using the word 'relationship' is a more neutral term, whether they have a strong bond and a strong relationship... (Barrister 1)*

As discussed above, the task of assessing siblings was usually considered to fall within the remit of social work, causing problems for some social workers who felt under pressure to work with psychological concepts that they did not feel qualified to use:

*...I feel that I'm not an expert in attachment...I've done a few courses, I've read some books, I've chatted to all the psychologists but I think it's such a huge, complex concept that I struggle to refer to it, if you like, in any expert way. And I know that one of the managers was referring to me as an expert and that, you know, that you should include it more in your assessments and I'm feeling, well, no, I'm not an expert...I think social workers, it's like you're a Jack of all trades and a master of none. (Social Worker South Focus Group)*

A solicitor shares their concerns.

*...my view still is that attachment theory isn't something that social workers, be they case workers, allocated social workers in the case or guardians, they're not necessarily trained and expert in that, it's potentially beyond their capacity to give professional evidence on that and then you're into needing expert evidence on attachment in more complicated cases...(Solicitor 2)*

Another solicitor thought that the new emphasis on sibling assessment was helpful for newer social workers and guardians who perhaps lacked the knowledge of child psychology which their predecessors might have gained through professional training:

*And now they have to provide the analysis and to talk about, you know, the enduring relationship and the experiences that they've shared together and how important it is. I think because now you have a framework especially with new social workers and new guardians coming through, they can think about it a bit more clearly. Because years and years ago, to become a children's social worker you had to do some child psychology in your training and that's not necessarily the case now so social workers and some guardians don't really understand about attachment. I'm sure that they do get some training along the way, whether it's by experience or... but it's not... child psychology isn't necessarily something that they have looked at which is a little concerning. And of course for me to be a children panel solicitor initially as part of my three day course I need to learn about that as well. (Solicitor 5)*

The following quote from a social worker suggests that the diffusion of 'attachment' through the system occurred partly due to changes in the use of experts, that in diminishing the recourse to independent experts, social workers have been assigned a greater role in assessments which were the preserve of psychologists (Brown et al, 2015).

*...a few years ago we weren't seen as experts in child attachments with each other, a few years ago we couldn't use the word 'attachment' without being criticised because we're not a psychologist...so I think now the sibling assessment is being used more and they are calling social workers to do it rather than somebody else to do it. (Social Worker North Focus Group)*

This local authority solicitor discouraged social workers from using 'attachment' because he thought their lack of qualification would be picked up on by the judge or the parents' lawyers to challenge the care plan.

*As a lawyer you check someone's draft document before it goes into court and I'd be a little cautious of a social worker using that terminology because you'll get other lawyers who might criticise them on the basis of, 'you're not a psychologist, what business have you got commenting on that?'...we might sometimes refer to...'research would tell me this is indicative of this type of attachment style or that type of attachment style'...but they would generally avoid making any sort of diagnosis or attaching a label to something...(Solicitor 9)*

However, it appears that despite its problems, 'attachment' is being rolled out across the system, with less precise, expert-based conceptualisations coming into play. In one of the IRO focus groups, attention was drawn to recent changes in training across children's services:

*IRO1: I think within our authority there's been a lot of training around attachment, not specifically called attachment training but it's been embedded in a broad range of training, training that we laid on for teachers around children learning, was actually based on damaged attachments and if you've got damaged attachments, kids can't learn. They're going down the therapeutic parenting route so they are now doing a lot of training with carers around what attachment actually means, how you can promote positive attachments, how you can support children who have attachment issues so it's becoming more of a kind of more embedded thing now than it used to be, I think.*

*IRO2: I'd agree with that...so we've got attachment friendly schools, we've got programmes which health visitors and school nurses are working towards. Everybody's working to the same end because we know that, you know, children's attachments aren't just about an attachment to a main caregiver, you know, it's anybody who is going to be a key positive influence in that child's life otherwise they'll make negative attachments and go off and do whatever. (IRO North Focus Group)*

A guardian also reported more awareness of 'attachment' in the system today, something she welcomed.

*Say a decade ago, if I mentioned attachment you'd have judges looking at me blankly whereas now...I think they have come to have a better awareness of it...It can be with a parent. It can be with a sibling. It can be with a non-relative...With the sibling it's more about kind of mutual support and somebody who has experienced what you have experienced growing up. So I think there's a general upping, it's come up the agenda. (Guardian 3)*

However, from our findings, it would seem that prior to 'attachment' becoming thoroughly embedded in child law, there will be need to be serious consideration given to its meaning and its application.



## Parentification

From our review of the literature, we knew that ‘attachment’ was likely to be a key theme as a descriptor of sibling relationships, but the case law review also sensitised us to the concept of ‘parentification’ where descriptions of siblings as ‘parentified’, ‘taking on a parental role’ or acting in a ‘quasi-parental’ way seemed to play an important role in sibling decision making. We included a probe about the concept in the interview schedules but found that it often emerged spontaneously in professionals’ accounts of cases. Like ‘attachment’, ‘parentification’ is a psychological concept which was developed to describe particular problems in the parent–child relationship (where a child inappropriately takes on emotional responsibility for a parent’s feelings), but which has entered into common parlance in reference to siblings. With ‘parentification’, unlike with attachment, amongst our interviewees there was no evidence of challenges to the legitimacy of the term or recognition of issues with its transference from parental to sibling relationships.

Parentification was a concept strongly associated with parental neglect and could arise in threshold arguments.

*...you will often find with older siblings you will say as part of a threshold that they’ve performed a parental role for their younger siblings and that’s because obviously the parenting is quite lacking so they have taken responsibility when they shouldn’t have at far too young an age for their younger sibling. sometimes helping them get dressed, feeding them, all of those kind of things. (Barrister 1)*

*They may say that is symptomatic of the fact of the parents being...neglectful...they haven’t put that in the threshold per se but they’ve used it as part of their evidence just generally. (Solicitor 5)*

As well as being associated with parental neglect, talk of parentification seemed to be a way of focusing on the needs of the older child: the older sibling is often cast as a loving caregiver who steps into the breach left by neglectful parents.

*And we forget that this child who might be 10, has put their sibling to bed, has changed their nappy, has comforted them when they’re distressed, has comforted them when their parents are going at it... (Guardian 2)*

It was also pertinent to considerations of older siblings as kinship carers (FRG 2011).

Through the concept of parentification, the older child’s experience of loss in the event of sibling separation is brought to the fore as it is said to be intensified by the responsibility they have taken for their younger siblings.

*And I think sometimes when it’s in a situation where that older sibling’s probably cared for these children and took on a lot of the responsibility where the parents haven’t been able to sort of have the ability to care for them, I think that’s a massive loss for a child that age. (Social Worker North Focus Group)*

*And not only have they lost their parents, their home, their school, the few friends they might have had, they’ve then lost their sibling and it’s really traumatic. (Guardian 2)*

However, in practice, this loss was described as usually lacking the weight to counter arguments for separation because it could not outweigh the younger sibling’s need for permanent *appropriate* parental care. In addition, it could sometimes be argued that the best interests of the parentified older child required separation so that they could be ‘restored’ to appropriate childhood behaviour. This perspective was evident in the comments of the coalition government’s Adoption Adviser Martin Narey, who argued in 2012 that,

*On siblings, I have concluded that...we need to ensure that local authority and court decisions are informed by the research evidence which tells us – much as it might surprise us – that keeping siblings together may not always be in the interests of individual children. For example where, through a period of neglect, an older child has been effectively parenting a younger child, it can be vital for them to be separated so that each child can develop a positive attachment with their new parents. (DoE, 2012)*

Our young advisers offered some interesting insights into ‘parentification’ from their perspective.

*So when my little sister was born, my first little sister, I was 12, so obviously there was a massive age gap and from when she was about four months old I brought her up like a lot more than my mum did, so I like did everything, like bed, nappies, bottles, like basically parented her, so maybe like, I don’t know, I had like a stronger attachment than like siblings would. So when it all went to court they were like on*

*about adoption and everything, like she was going to be adopted because obviously she was only little and like never once did they say like, 'oh well how would I feel' because I obviously didn't really have a chance to speak. Like they kept saying to me like 'oh you realise you're not her parent' and things like that but like she's got a special guardianship now so I can see her like a few times a year because she lives quite far away but, yeah, when they were on about like adoption and stuff it's literally all about the baby. Like oh well, she needs to grow up stable and all of this like and it was never like, I was in school, how was it affecting me. Like what if I wanted to see her? Like things like that, it was just nothing like at all. (YPPG2)*

Once again we see that the concern for achieving permanence for the younger child can obscure considerations of the older sibling, in particular when 'permanence' is sought through adoption. Another young adviser described how, at an even younger age, she had assumed responsibility for her younger brothers.

*I'm really close to my brothers now as when I was younger, they wouldn't remember, but my carer tells me a lot of the time when they was younger, if I was at home it would be me that would look after them because my parents were drug dealers so they'd go out in the night and just leave them in the house...So a lot of the time I kind of looked after them as well and at the time I was only four so I still needed to be looked after too but I kind of learnt how to do that myself. So I was like developed more than like normal four-year-olds at the time because I had to do so much. And obviously we had a close bond but it wasn't like a sibling bond, it was different if you get what I mean. (YPPG2)*

These first-hand accounts by children deemed in official language to have been 'parentified' should act as warnings against over-simplified views that the 'parentified' older child is 'damaged' or a 'problem', and especially, that their love and care for their siblings should not be translated into an argument for separation.

The negative reading of the 'parentified' older child was also contested in our interviews:

*...I'm not a psychologist but it's usually to say well, 'that child has been parenting their younger siblings and they need to be given an opportunity to be a child' so they get separated off and to me, you know, that strikes me as something that could be quite damaging because it's going to cause a loss of identity to that child and could be devastating. (Solicitor 10)*

It was also contradicted in a case where a guardian raised the protectiveness of older siblings towards younger ones, which had developed through their shared traumatic experience, as a relevant factor when recommending that a sibling group of four children should maintain close, direct contact with each other.

*It is my view that the sibling relationship is the most enduring in this case given their shared experiences that has formed a unique bond which they do not have with anyone else. It is my view that direct contact between these children would promote stability in any future placement. (X County Council v AJBM [2016] WL 0082673 at para 93)*

The judge determined that the siblings' need for direct contact was such that placements should be considered where this could be maintained and explicitly questioned the appropriateness of adoption for the younger children (for further discussion of this case see part 6.3). Amongst all groups of professionals there was considerable unease and uncertainty about decisions to separate parentified siblings:

*Because I've come across cases where it's advanced as a positive argument for separating siblings that one of them is being the mother and that's not good...and I struggle with that personally because you then... I would have thought it's better to keep the kids together but just help the older one be a sister rather than a mother, rather than take away a child that they've been really, really caring for and have all that loss to deal with. (Solicitor 7)*

*For me it wouldn't be an argument. I think it might be for other people. It might be an argument if this child was doing extremely badly at school, that acting in a parentified manner had actually led to behavioural difficulties or they're at risk...they've become vulnerable to something like sexual exploitation or other things then I think you'd want to minimise the risk but if it's just a question that a child's been pushed into a position of looking after other children, presumably if they're in the right place, they'll relinquish that control...they're relieved of it because they'll see someone else looking after that child. (Guardian 1)*

*That's very common. Very common indeed, yes...one of the first tasks of the foster carer is to persuade the child to let go and let the foster carer parent and let the child be a child. So, yes, it makes it more difficult in many ways if the children ultimately end up in different places because the child is not only mourning the sibling relationship but also the parent relationship effectively. (Judge 1)*

As well as questioning whether parentification required resolution through separation, professionals also queried where the line could be drawn to delineate 'parentified' from 'normal' inter-sibling care. Some professionals suggested that there were cultural differences in children's roles which might render parentification a problematic description.

*I think in certain cultures children are expected to grow up more quickly than they do in others...So there may be an expectation that children assume more capability in terms of sharing parental chores. In an ordinary English situation, a culturally white English situation where children wouldn't be expected to do that...It's very middle class really. I mean I don't know. I'd have to look at how damaging it was for the individual children concerned. So I if at all possible deviate towards the individual is my view but I might be in trouble over that, I don't know. (Judge 2)*

### Trauma and violence

Another psychological theory or concept which surfaced in the case law and which we were subsequently attentive to in the interviews was 'shared trauma'. 'Trauma', like 'attachment', has become widely diffused in organisational thinking in recent years, particularly at governmental and third sector level. And, like 'attachment', it too can lead to contradictory conclusions being drawn. Sometimes it was perceived positively, for example as contributing to 'a possible protective factor for the children', through 'their closeness and bond to one another' (*Re T (Children)* [2014] EWCA Civ 1369 at para 18) and, in that case, legitimising the prioritising of contact. Similarly in another case, a guardian, commenting on siblings who were described as having experienced trauma, that they:

*bring each other comfort and are mutually supportive. K looks out for and speaks for L but K also seeks reassurance from L. In her opinion separating K and L from each other would cause them further emotional trauma. (In the matter of J, K, L (Children) No: BH15C00347, 4.3.16 (2016) WL 01253997 at para 106)*

But in another case, which resulted in prohibiting contact, it was found that:

*the relationship between the siblings is also a trauma relationship and which therefore will be bound to create difficulties with a risk of a profoundly negative impact upon them both in future' and consequently that the child: 'needs to recover and only have limited exposure to dysfunctional attachments'. (RBC v W & N, No: RG14C0198, 29.5.15 (2015) WL 3404799)*

In some cases, a child was described as being so badly affected by conditions in the birth family home that they could be abusive to their siblings. In this way trauma was linked to violent inter-sibling relationships.

A large number of cases concern fact finding in order to identify the perpetrator of harms, a much commented on complex issue in care proceedings. The growing awareness and acknowledgment that siblings may be the perpetrator was evident in the case review (Meyers, 2017). Typical, for example, in one case was the forensic finding by a medical expert that: 'younger siblings could not have applied sufficient force to cause these injuries' (*SCC v EK, AJ, MJ, VJ, IJ (Minors acting by their Children's Guardian), MK* [2015] WL 3952952 at para 52). Critical here too are forms of inter-sibling sexual abuse. It is most often put down to bad parenting and as noted above an issue at the threshold stage of care proceedings. For example in one case it was found the inter-sibling sexual abuse was, 'a result of the lack of sexual boundaries and supervision in the home' (*Birmingham City Council v CH, L, B (Represented through the Children's Guardian) v PH* [2015] WL 4635317 at para 14). In these cases the issue of promoting contact between siblings is absent from the cases and, as noted later, may give rise to an order prohibiting contact. While not suggesting that these decisions are necessarily wrong, we note that sibling relationships found or assessed to be in some way violent or 'dysfunctional' are treated differently from paternal-child relationships where there is evidence of domestic violence. Common sense assumptions that contact is inappropriate in the former context appears stronger than in the latter, an issue that has given rise, in that context, to much debate (Kaganas, 2010).

In cases where behaviour falls short of being clearly abusive or, indeed, criminal, there is difficulty in evaluating whether the relationship is dysfunctional or within the bounds of 'normal' siblinghood. As noted above with parentification, this is a difficult line to draw. What emerges from the case law is that the line is drawn by those assessing sibling relationships and that, possibly, this is because it is required or expected in order to legitimise recommendations in a care plan and subsequent orders.

Some of the young advisers expressed concern that assessments which reveal a difficult relationship between siblings could potentially legitimise less efforts to sustain contact.

*You can make it into a decent relationship by the support that you can get. We should be allowed to fall out and make back up.*

*...it will change and it needs to be allowed...Not just because at the minute you're falling out as a sibling, you know, brothers and sisters if we don't get on, if we're angry with each other for a situation that that should be it forever. (YPPG2)*

'Trauma' and the concept of a 'dysfunctional' sibling relationship inform practice. Both require more rigorous interrogation when relied upon to shape assumptions about complex human relationships which in turn inform long term decisions about what should happen to siblings.

## 4.5 Age: The dominance of a pragmatic category

Although we have spent some time considering the place of psychological theories in the assessment of sibling relationships, we emphasise again that 'age' is a descriptor of children which carries great weight, often more than the concepts considered above.

*...prioritising pragmatism is very tempting. You know, you've got three children. One's aged six months, the other two are twins aged six. They're all girls. They're all pretty. They're all in good health. You might find a placement for all three of them but how long do you look for a placement for all three of them? At what point do you give up on the placement for three and say well, we'll go to long term foster care for the six year old twins and we'll find an adoptive placement for the baby? And if you do do that, what do you then do about ongoing contact between the siblings, given the local authority's usual mantra that I mentioned earlier which is if you've got an older sibling having contact with birth parents, that child cannot have contact with a younger sibling who's in an adoptive placement. (Judge 4)*

That age was mapped onto the quality of a sibling relationship was reported, and in some cases, challenged by interviewees.

*I think social workers often automatically look at the closest siblings in age as opposed to the closest relationship. (IRO North Focus Group)*

*So they tried to pair them off in terms...probably in age actually, because they assume that the relationships are going to be closest to those next in age...I have come across sib-sets which have just been, not quite randomly, but on an age basis...(Judge 2)*

In another example of a professional querying sibling decision making, the cool behaviour of an older child towards their sibling was described as having been misread as evidence of the absence strong sibling feelings.

*...you do get some older siblings who don't really...they've not shown any interest and that might not necessarily be an indicator that they wouldn't go on to have an excellent sibling relationship, it might just be that an eight year old isn't that fussed about this little creature that's coming in and down turned their life upside down or whatever so...(Solicitor 9)*

As discussed above, 'adoptability' is clearly not a quality possessed by the child, and yet it is a key factor in sibling decision making. The older child can be constructed as a threat to the achievement of an adoptive placement for its younger sibling because they are considered less adoptable:

*Well I think if you've got an older child, and I'm talking certainly over five, perhaps over seven, they're not natural candidates for adoption at the end of care proceedings. It's difficult to find adoptive placements for a seven year old and above. And if you've got a sibling group that comprises, say, a seven year old*

*and a two year old, you've got a problem. The fact that you've got the two year old might just help the seven year old into an adoptive placement but it might not. It might actually...if you're trying to find a joint placement that having a seven year old might actually make it far more difficult to find an adoptive placement. (Judge 4)*

The sense of 'a race against time' is evident here whereby the older sibling's unadoptability threatens to delay adoption for the younger siblings, thus rendering them also unadoptable. However, this perspective was described by some as now being challenged by new thinking in the system.

*...if you had children where there was a very young under five and an older child over five, then you placed them separately because it was easier to place a small one for adoption. But I don't know that that happens in practice as much as we may be thought. But I have had it argued on occasion that it would...if you tried to place them together it could take much, much longer whereas if you place the youngest one for adoption then it would be...you could do it quite quickly...and I think these days courts would be looking far more closely at that. They would be looking if there was a chance of the children being...if they weren't returning to parents or family I think they'd be looking at is it possible to keep children together because of the perceived psychological benefits. (Guardian 3)*

This is not to say that there are not real challenges posed by age gaps in sibling relationships. In some instances, the older child was regarded as a direct safeguarding risk, through their abusive behaviour towards a sibling, through risky or criminal behaviour, including 'radicalisation'.

*Yes, I mean certainly cases where it's argued, you know, the older sibling is into drugs, you know, criminality and whatever and therefore, you know, the younger children need to be protected from the older sibling as well as from the perceived parental deficiencies. (Barrister 2)*

*It was four siblings in a Bangladeshi family where I was guardian and the two older girls were in completely different placements, probably rightly so. I thought both of the older children were at risk of radicalisation, I was really frightened for them and they'd been groomed by a particular Asian group. (Guardian 1)*

In contrast, in the comments below, a judge considers the future benefits to a young child of a relationship with a much older sibling.

*I've certainly seen parents objecting very strongly to placement for adoption applications where it means there's a child left behind. I've very recently dealt with an application permission to oppose where it was hopeless at every level but the one thing which I think was a very fair point was that there was an 18 year old sibling, obviously not a child, who very much wanted to be part of this much younger sibling's life and of course it's reasonable to assume the younger sibling will benefit from having a relationship with that sibling...(Judge 1)*

## 4.6 Lay knowledge and 'common sense'

We can see with 'attachment' and 'parentification' (and to an extent with 'trauma') that what start out as 'expert' concepts can become 'common sense' descriptors of children's relationships. But because of the particular role of psychological expertise in child law proceedings, this can cause confusion. Speaking of sibling assessments, a judge illustrated this movement between 'lay' and 'expert' language.

*...they won't use the word attachment, I find they use the word relationship and they'll talk about whether it's close, it's warm, it's parentified, whether they look to each other and that will then give you the picture of what the attachment is or not. (Judge 3)*

A 'lay' phrase that was repeated throughout the interviews and in the case law and is evident across the contemporary discourse about siblings, is that sibling relationships are 'the most enduring' or 'longest-lasting' relationships in most people's lives. In a 2014 case, Holman J observed that, 'it is my experience that social workers and others sometimes overlook in these tragic situations that relationships between siblings may be the most enduring of all relationships in many people's lives' (*LB Haringey and MUSA* [2014] EWHC 1341 (Fam) at para 8). In our interviews and the case law, it was usually used to give weight to the sibling relationship, to describe a more sibling-aware system and, perhaps, to indicate that the speaker shares this appreciation for the significance of siblings.



*...the sibling attachment is perhaps the most enduring relationship that those children will have so it's really important.* (Judges Focus Group)

It is now universally accepted that sibling bonds can be the most enduring of birth relationships because they will persist long after the death of a parent. (*RBC v I & G* 2016 WL 02641952 HHJ Owens at para 70)

*In literature it keeps being referred to as the most enduring relationship, so you see it in court reports and everything because of course potentially it is...And I don't know quite where that's come from but there must be a sea change in thinking...And actually there's a recognition of the value, potential value, because of course sibling relationships are not without difficulties as well.* (Guardian 4)

The 'most enduring' theme was also articulated by our young advisers in emphasising the importance of siblings.

*...when you think about it, not in like a nasty way, who's going to be in your life longer; siblings or grandparents?* (YPPG1)

*...because basically a sibling's going to be there in your life longer than a parent ideally and...I know people don't want the parents to die and all that but like, you know what I mean?* (YPPG1)

In more specific examples from the professionals interviews, there was evidence that 'enduring relationships' could be used as an argument to contest proposals for separating siblings or in arguing for the priority of sibling contact.

*Well we're always told that the sibling relationship is the most enduring one. That's what we're told a lot of the time. And so, you know, I always knock that back on its head and say well if that's the case, why are we talking about separation?* (Barrister 3)

And this was also found in the case law.

*...Sibling relationships are most likely to be the most enduring relationships that a child will have, and the prospect of separating these four girls from one another for the whole of their minority and potentially the rest of their lives was very stark and, in my judgment, not in their welfare best interests. (*Northamptonshire County Council v AB, CD, The Minors by their Guardian* [2017] EWHC 3695 (Fam) Keehan J)*

*As I have already said, we are repeatedly and correctly told that a sibling relationship is potentially the most enduring relationship that most of us will ever experience. In this case these three young sisters have suffered similar experiences of abandonment by their parents and I consider that their shared experience will enable these sisters to provide each other with support as they grow up. (*London Borough of X v KD, MP, WP, LP (by her Guardian)* 2016 WL 04261451 HHJ Harris at para 112 )*

It can also be referred to as a consideration which demonstrates that the potential consequences of separation have been examined, in other words the statement provides evidence of having applied the correct legal tests, in contexts where it is outweighed by other factors, most often the need for 'permanence':

*So despite the huge importance of sibling relationships, the most enduring, lifelong, as I am frequently told, it seems to the court that A's pressing need for permanent substitute parents ultimately has to take precedence over the desirability of ongoing contact with his birth family. (*Re: M (A Child)* 2016 WL 03409206 HHJ Wood at para 16)*

*I mean quite frequently in this sort of work when you have a sibling group, the baby and older kids, you do end up separating siblings and obviously... it's sort of accepted, isn't it, that sibling relationships can be some of the most enduring and important relationships and to just sort of interrupt that so dramatically you would hope that it's been done on a good evidence base.* (Solicitor 9)

However, for one judge at least, the meaning of the phrase could become platitudinous, lacking the weight of empirical research.

*What they'll say is...we appreciate that the sibling relationship is the most enduring one that we'll have and that sibling relationships are ones that shouldn't be broken, so they'll quote you that sort of thing but they'll quote you lines. It's, you know, phrases. It's not really... What's the word? They won't quote me, you know, X's research on it.* (Judge 3)

## 4.7 Practical problems with sibling assessments

We asked our young advisers what they thought it would take for an outsider or professional to understand their sibling relationships.

*I don't really think there is a way unless you actually see it because when I got taken off my parents, my brothers stayed together but I got put somewhere else but I never really lived with my parents anyway, I lived with my Nan so...like I wasn't that close to my brothers but my brothers were like really, really close, especially because they were close in age too so they were into similar things...So I don't really think there is a way to tell how close siblings are unless you actually know them. (YPPG2)*

Nevertheless, her relationships with her brothers was of great importance to her and she valued contact with them very highly.

Key issues for the professionals charged with conducting sibling assessments were the scope to observe and 'work with' the children, (and whether this could happen in appropriate environments) and the time to meet other adults such as teachers and foster carers (the birth parents did not figure strongly as sources of information).

*...in anticipation of seeing you I was just sort of chatting to some colleagues earlier and I think there's a general sense that the value and the quality of those reports is really variable. For example, to take a really crass illustration, I recently was on a case where I was acting for a mother whose case was that the children in fact had very close relationships and gave a number of examples of the sort of things they did together and was arguing that whatever their journeys should be, they should be together. As I recall there were two...younger children and one older, a teenage child. And in the Together or Apart assessment there was a description and it's based on a snapshot, one observation of the children...It was the social worker...she observed that the two younger children were playing together, you know, and the older one was leaving them to it and was sort of playing with her phone and that sort of thing and inferred from that that there wasn't a close relationship between the three children. Now I mean that seems...risible when one puts it like that, because I suppose many people say from their general experience that where you get, you know, a bit of a gap between siblings it's unsurprising that each would be doing kind of age appropriate activities and not necessarily connecting with each other but in order to really understand what goes on between children, you need to observe them, don't you, on probably several occasions and also to just know more about them...those are quite complex judgements which I think it's unsafe to make on the basis of just one snapshot. (Barrister 2)*

Another barrister expressed concern that while both social workers and guardians had key roles to play in sibling decision making, they could lack the knowledge and experience to adequately gather information and make a judgement. They also suggested that the system itself, in particular through the role of the guardian, allowed for insufficient rigour in the assessment of sibling relationships.

*You know, they're not required to do any more than the bare minimum and produce two reports but both of them are very thin in substance and sometimes analysis so when you've got a case that involves complications in terms of planning different sibling groups, different needs, it can be difficult because if a guardian's new and not very thorough, you know, has there been a proper sibling assessment done for example? Who's doing that? Is it a social worker doing it? How qualified are they to do that? I mean it's a social work piece of work but are they experienced enough to do that? (Barrister 3)*

Judges expressed similar concerns about the current quality of assessments.

*Well what you should be seeing and what you tend to see are not necessarily the same things. But we should be seeing a detailed analysis of each child and the nature of their relationship, the impact on each child if they're not able to reside in the same household and how that might be mitigated and so forth...It varies hugely. I mean there are some social workers who do a fantastic job. As we know, it's a difficult job at the best of times but some who just don't have the experience and don't have the supervision. So the quality does vary enormously. (Judge 1)*

*They do vary. They can be really good or they can be pretty superficial and if they're superficial I'll poke at them and see whether I need more information and sometimes they can be really very good. It depends on how much time the social worker has because the more time the social worker obviously takes with a child, gets to know the children, the better it is. (Judge 3)*



A social worker expressed reservations about too much weight being given to sibling assessments.

*I must admit I'm a little bit wary of sibling assessments, only because I think there's a lot of variables that you've got to take into account before you can kind of place any great store in them so I think they're really useful to kind of help shape the discussion but I don't think that we would make any grand decisions based on them...I think as you're filling it in you might catch the foster carer on the wrong day, you might catch the child on the wrong day, you might have had a rotten day, you might be tired and I think that as you're writing down your observations, actually you've got to be really conscious that you are just writing down your particular picture of something that is happening in front of you and it might not be... You know, it's not the truth, it's a version of the truth and you can build that in to your kind of way of decision making, shall we say.*

But a fellow social worker disagreed:

*I wouldn't agree with that and I think that when you're ordered to do one say for instance in care proceedings there's a huge emphasis now on timescales of care proceedings and say for instance your parenting assessment's due at the point of 12 weeks, your together and apart's due at the point of 15 weeks, final evidence at 16, that document is the most influential document that will be used to determine whether or not those siblings stay together so it needs to be done on an ongoing basis so it isn't just, you know, the foster carer...you'd have to have lots and lots of contact...and direct work with the children. But in care proceedings I think it's the most influential thing that's considered particularly from like my kind of local authority in terms of whether those children live together for the rest of their lives. (Social Worker North Focus Group)*

Concern was expressed by a few professionals about the impact of emergency placements on subsequent sibling assessments, for example, by observing siblings separately or in temporary configurations or 'sib-sets', distorted relationships could become reified.

*...children are taken and they're placed immediately in different foster placements because that's the only resource we have and so you then find the sibling assessment might naturally split them up that way. (Barrister 3)*

The judges focus group discussed the tendency for a 'together' assumption and age-based presumptions to obscure consideration of siblings' individual needs and stressed the need for good assessments to 'pull apart' assumptions:

*I think there's probably quite a few assumptions about siblings and a good assessment is one that actually pulls it apart and I think there are assumptions about, well, it's always better to place together. Not necessarily, if they've got particular needs. The older sibling who'd just be adopted because there's two shiny younger ones, you know, those kind of assumptions are quite frequent. And a good assessment is one that actually challenges and looks at whether that is the case or not. But I think sometimes siblings can be brushed over with, 'oh well, it's better to place together or it's better to do this or we shouldn't separate them'...without any thinking or real analysis going into it. (Judges Focus Group)*

## 4.8 Standardisation?

It could be argued that standardisation of sibling assessments would be a good thing. While it certainly seems that there ought to be generally agreed 'good practice' which is consistently followed across regions and local authorities, there are, however, critiques in the social work system at the moment of approaches which rely too heavily on assessment tools, proformas and checklists as a substitute for deep professional training, knowledge and experience, capable of dealing with the highly individual needs of particular families, but also the highly individual needs of particular children within those families. This guardian emphasises the need to make highly individualised assessments of particular family dynamics:

*...we need to also look at the parents' role in impacting upon the sibling relationship, how kids are played off against each other, how kids are made to abuse each other and the reminders of that for children when they see each other is so complicated. And I think that's why you can't have a tick box form for everything. You can have consideration points when we're thinking about siblings together or apart, so you can have*

*like...almost like prompts and what about this? What about that? What about...It cannot be formulaic because actually there might be some similarities but all of these relationships are different. (Guardian 2)*

These barristers reflected that standardisation does not automatically translate into a high quality assessment:

*Prescription, of course, doesn't necessarily mean that qualitatively helpful content is also present... (Barrister 2)*

*There are some that I think are going through the motions and is actually just an exercise in confirmation bias which is using what's there to lead to the outcome that seems fairly obvious from the papers is the one that's being sought anyway. (Barrister 4)*

A guardian was particularly perturbed by a case in which, although a Together and Apart assessment had been conducted, she felt that it was biased towards the local authority's intended care plan, and additional assessments failed to influence the local authority to change the plan towards a proposal that would allow for the maintenance of a sibling relationship, either through a shared placement or through separate adoptions but with direct contact.

*It was a Together and Apart assessment. And like I say, I think there was a kind of a subtle undermining of the attachment relationship, making assertions in my opinion which didn't have any real foundation that the older child would somehow through her own trauma destabilise the placement if they went into a placement together, into an adoptive placement. (Guardian 5)*

Her experience confirms that tools, instruments, checklists and expertise may be insufficient to ensure deeply informed and sensitive sibling decision making, capable of reflecting on all siblings' best interests:

*....what came out very early on which I think they were open about, was that I think within the assessment there are some checklists which you do and the social worker said, "Oh I've only done the checklists." So by her own admission she hadn't actually done a full assessment which is obviously when we were deliberating about independent social work assessment. You know, one of the points was that actually it feels like this has been done in quite a rushed way. And, again, I think that was an issue that I felt it wasn't a thorough piece of work, it was done as a means to an end and that in essence 'I've just done the checklists' and, yes, I did feel that they were making a scenario fit what they wanted it. (Guardian 5)*

## 5: CARE PROCEEDINGS

### 5.1 Introduction

In this chapter we examine how the legal framework for care proceedings operates in practice. We identify which factors, in particular the type of placement, impact on how contact between siblings is addressed in care plans. We also identify the roles played by the different professions in care planning involving siblings and their perceptions of those roles. We begin this part of the report with a brief examination of allocation and gatekeeping of proceedings in the family courts, a rarely examined issue in research. We then turn to the care planning process before examining what happens after the making of care orders. We conclude this part with a detailed explanation for the lack of use of contact orders for siblings in care.

In this chapter, we emphasise siblings who are separated through arrangements other than adoption, which we examine in detail in Part 6. This is because adoption often tends to dominate expressions of concern about the sibling relationship. This is understandable for if siblings are separated by adoption there is a change in the *legal* status of a sibling relationship; and it is only here that the impact of the potential loss of the relationship is a factor that the courts are required to address explicitly. The case review revealed that the assumption that alternatives to adoption are more likely to ensure the maintaining of contact with birth relatives is routinely made in the analysis of the advantages and disadvantages of adoption. As Black LJ held in a much cited judgment:

Contact in the adoption context is also a different matter from contact in the context of a fostering arrangement. Where a child is in the care of a local authority, the starting point is that the authority is *obliged* to allow the child reasonable contact with *his parents* (section 34(1) Children Act 1989 ). The contact position can, of course, be regulated by alternative orders under section 34 but *the situation still contrasts markedly with that of an adoptive child.*' (*Re V (Children)* [2013] EWCA Civ 913, at para 96 (iii), emphasis added).

The obligation on local authorities referred to by Black LJ does not apply to siblings, and as noted in the introduction above proposals to change this have been made. However the case law review and the interviews revealed that the obligation was sometimes implicitly understood to apply to siblings<sup>30</sup> and that the assumptions about contact between children in care and 'family members' was applied equally to both parents and siblings. As Macfarlane LJ held in 2014:

The conventional starting point for contact to a child in long term foster care is for existing relationships with family members to be maintained by a regime of fairly regular direct contact unless there are specific child focussed reasons for taking an alternative course...The reason for the default position in favour of some direct contact is plain. A child is only in foster care under a care order until he or she achieves the age of 18. At that time and in the years to follow they will be free to re-join their family on whatever basis they may choose. Artificially terminating all contact during the intervening years is therefore likely to be entirely counterproductive and a step which will inhibit the young person's developing sense of their own identity within their family. (*Re G (A Child)* [2014] EWCA Civ 1173, at para 35)

One of the barrister interviewees commented:

*I think courts are much happier about...being directive in relation to looked after children...it's not the same sort of no-go area as adoption.* (Barrister 2)

However a key finding is that there are wide variations in the degree to which courts are prepared to be 'directive', and in particular great reluctance to make court orders for contact between siblings. The practitioners we spoke to emphasised that establishing and maintaining contact between looked after children is often far from straightforward. Our findings here indicate that while the *legal relationship* between separated siblings in care or accommodated elsewhere remains unchanged, if contact is not enabled, the *reality* of a loss of the relationship might be just as real and profound as it is in cases involving adoption. Consequently there is a risk that the binary assumptions made about contact post-adoption and contact during care risk complacency about the latter.

<sup>30</sup> For example, see (*Worcestershire County Council v Mother, The child By the Child's Guardian*) 2016 WL 00890444 where in reference to the relationship between the child and his half siblings the judge held that the local authority's *obligation was to promote contact*, HHJ Rundell, at para 27.

## 5.2 Allocation and gatekeeping

*Certainly anything which involved any complicated issues relating to siblings I would hope would not be before the lay justices although I couldn't guarantee that either...my recollection is that anything to do with siblings is not actually referred to anywhere in the guidance...maybe it should be. (Judge 1)*

A key question in practice is determining which level of the Family Court a case should be allocated to. In the current guidance the only explicit reference to siblings is to consider existing proceedings 'relating to the child or sibling in order to provide continuity'.<sup>31</sup> 'Complexity' is the key relevant general factor. There was wide agreement that the existence of siblings, per se, did not and should not warrant, a case automatically being allocated to District Judges.

*There's no reason why a magistrate shouldn't deal with a sibling group. I mean you're not necessarily saying 'sibling group therefore problem'. There may not be a problem. But if there is a problem, it could be more complex than in your average case. (Judge 4)*

But despite the acknowledgment that a sibling issue could be complex enough to justify allocating the case to a higher court, there was a lack of clarity about what exactly might deem it necessary. Significantly, despite cases involving the separation of siblings being described by judges as particularly troubling and difficult, that factor alone was not considered necessarily 'complex' in this context to justify allocation to a District Judge, although one judge suggested that 'maybe it ought to' (Judge Focus Group). As one judge noted: 'it might be an issue which would arise in any level of case' (Judge 2).

Age and the size of the sibling group were both referred to as possible complicating factors. A magistrate suggested that, 'I would say four would be the max that we would deal with and most lots of four probably go up' and that there had been a change:

*I've actually had a case with four children...ranging from 11 to five and there were differing outcomes...I can't help thinking that that case might have ended up being allocated to a district judge in today's environment but this was pre-single family court. (Judge 5)*

District and circuit judges confirmed age and size as factors, but were less certain:

*I think if you've got a large sibling group, four or five children, if you've got multiple fathers, you might then be in the territory where at allocation you might think of, say, district judge at least rather than lay bench (Judge 4)*

*J1: Occasionally if you have a number of siblings of very different age groups in which you may have conflicting care plans, different parties, that can add to the complexity of a matter which may justify certainly a DJ allocation...*

*J2: It might be the number of parents.*

*J3:...that might push it up into the more complex bracket because of the number of potential disposals and the sheer number of plans to be looked at. (Judges Focus Group)*

Other facts that were deemed 'complex' were cultural diversity and, in particular, cases of serious inter-sibling violence, both issues which are referred to in the allocation guidance.<sup>32</sup> But it was emphasised that it was the fact of the violence and not the decision to separate the siblings that was deemed 'complex' for these purposes, although, paradoxically, in those cases separation is rarely controversial.

The early timing of the decision to allocate was mentioned by all the judges as being problematic as it might not be until later that a decision to separate siblings, will be known:

*J1: I think the other thing to bear in mind about allocation and complexity and this is something I bang on about quite regularly, is that it should be kept under review at each hearing because you might start off with a group of five siblings and four parents and it might look suitable for magistrates or it might... but as it evolves and you see these children maybe going in different directions and have differing*

<sup>31</sup> President's Guidance on Allocation and Gatekeeping for Care, Supervision and other Proceedings under Part IV of the Children Act 1989 (Public Law) Issued in accordance with rule 21 of the Family Court (Composition and Distribution of Business) Rules 2014 (Issued 22nd April 2014), Sch, Col 1 (G) (16).

<sup>32</sup> Ibid, Sch, paras 1, 7.

*needs, we should be looking at it at that stage. So the mere fact there's a big sibling group as you both said about allocation doesn't make it necessarily complex, but it can become complex when the care plans evolve.*

*J2: I've delayed allocation because I've absolutely no idea still, and this is the second hearing, how complex it is and the advocates were so ruddy useless they haven't got a clue either. (Judges Focus Group)*

The issue was not raised spontaneously in the interviews and we did not find any cases about challenges to allocations concerning siblings. But the findings revealed that some judges, albeit cautiously, suggested that some clarity might be beneficial and that general principles seemed to be applied about age which may warrant further research to ensure consistent practice across courts. The issue of allocation more generally indicates how the routine nature of the separation of siblings is reinforced by it not being deemed 'complex'. By way of contrast a magistrate suggested that an application by a child for leave to make an application for a contact order might be considered more suitable for a higher court.

*I've never had that. I know the procedure exists. My guess is that an application of that kind would probably go before a higher level actually. (Judge 5)*

That such an application, unlike a decision to separate siblings, is deemed potentially too complex for a magistrate, emphasises the extent to which there is a perceived exceptionality to contact orders.

Significantly and by way of contrast, judges expressed much clearer and stronger views about how private law cases about relocation should be allocated. One judge commented that: 'I'd be quite worried about relocation cases being decided by anything other than a full time judge' (Judge 2). Similarly another observed that:

*Lower courts are hearing relocation cases. District judges are hearing them in [city name removed] whereas I wouldn't have allowed that in [city name removed] (Judge 4)*

A magistrate noted how these cases were also far more likely to be reported whereas their cases never were but that they perhaps should be:

*If you want to show how the process works in fairly run-of-the-mill sort of circumstances, nothing very exciting about it...up and down the country every day. (Judge 5)*

There was a perception here of a certain circularity involved in deeming cases 'complex': higher court cases being more likely to be reported reinforces the sense of significance. In other words the higher significance attached to relocation in private law cases reinforces the significance attached to parent contact and, by way of contrast, the very ordinariness of sibling separation with often limited if any contact. In this respect it is possibly significant that the word 'sibling' very rarely occurs in reported names of cases about siblings, reinforcing, again, the tendency to view decisions here while difficult to make not, in law, noteworthy.

## 5.3 Care planning

### Placement decisions and age

We have already discussed in Part 3: Terminology and Part 4: Assessments the significance of age in sibling decision making, for example, generally, siblings who are further apart in age were said to be less likely to be kept together. Sometimes this was because age was translated into the children having diverging needs:

*I mean two children who are not too distant in age...are not that difficult to place. Twins would be the archetype of that, as it were, because there'd be no difference at all. But the more the age gap between the siblings then the lower the hurdle...for somebody proposing different outcomes would have to cross because it means the children would be different and it might be that addressing those needs which might have to be done by a different way maybe by different type of placement would therefore mean, yes, unfortunately the children wouldn't carry on living together. It might well be that they would already have been separated from earlier on in the proceedings. (Judge 5)*

But age could also very explicitly determine placement due to 'system-focused' rather than 'child-focused' factors:

*...obviously when you've got good foster placements it's generally easier to place children of a similar age together in the same placement just because one of the reasons is because of the way foster carers are approved for specific ages of children. (Solicitor 9)*

As noted previously, many interviewees, across the professions, expressed discomfort with age-driven decision making especially where it gave insufficient consideration to the specific needs of a sibling group and individuals within that group and, in particular, to the needs of older siblings.

## Placement decisions and contact

An important aspect of the research was to explore how different placement scenarios relate to assumptions about whether, when and how contact should happen between separated siblings. We were also interested to find out the extent to which plans for contact between separated siblings were set out in detail in the care plan and whether these are challenged by judges and guardians, especially because contact orders are so unusual.

While most professionals described a presumption of contact for separated siblings where they are all looked after or in care or if some remain with birth parents, a counter-assumption applies where the sibling of a child in care is to be adopted. In this situation it was routinely assumed that contact will be problematic and probably impossible, especially if the older child remains with parents or maintains contact with birth parents. Our interviewees often found this lack of commitment to sibling contact troubling, but there was some suggestion that thinking about birth family contact post-adoption was beginning to change. We examine this in more detail in the next chapter.

Without severance by adoption, where one or more children remained in care, sibling contact was said to be a strong assumption which would require evidence of harm to override, but there were still barriers to sustaining contact between siblings in care.

In the case law, there is a lack of clarity about types of contact, most obviously, what constitutes the distinction between 'direct' and 'indirect' contact. This is important because those calling for a *duty* to make contact between siblings happen (as opposed to simply *to endeavour* to make it happen) need to address Bainham's point that 'reasonable contact', in Section 34, is not clear. He notes that:

*While the term 'contact' in the Children Act 1989 generally includes both direct and indirect contact, it is suggested that the intention of Parliament and the spirit of the requirements under the ECHR is that face-to-face contact is contemplated. (2015: 1357)*

Lack of clarity also seems to stem from the failure to separate out sibling contact decisions and arrangements from contact with other birth relatives. This is reflected in the lack of a special section in the care plan detailing contact with siblings. Lack of time for discrete consideration of siblings may also be a consequence of the imposition of the 26 weeks time-frame.

## Special Guardianship

Where there were separate placements but no legal severance by adoption, sibling contact was said to be a strong assumption because there was no threat to placement.

*...one of the arguments against direct contact with children who are not placed for adoption is the confidentiality point. If they're in non adoptive care with special guardian or foster carers or need a child arrangements order, whatever it happens to be, that argument falls away so there'd have to be an extraordinarily good reason not to promote contact. (Judge 1)*

But complex scenarios were recounted by some professionals which indicated that where a special guardianship order was made, contact between siblings was not necessarily straightforward.

*I had an SGO where the children were split and the kinship carer would only have that child with no contact because of the difficulties with the carer and the extended family so they took the younger child and there would be no extended contact...(Judges Focus Group)*

*I would be very sorry to see a situation in which siblings who love each other can't be together. And I do come across it quite often and it won't stop me from giving the sibling who can go to the family the opportunity of being with the family. I wouldn't prioritise siblings over placing one of them with granny in*



*the family which I think is very difficult because obviously the other child is going to feel loss of the sibling and also 'why am I left?' I really hate that and I don't... it's very hard to deal with. (Judge 2)*

One of our young advisers offered a glimpse into the potential complexities in sibling relationships when separated through special guardianship, in this case, the younger sibling's understanding of their family structure:

*See this is the problem I'm having with my little sister at the moment, because she's four and she asked who my mum was not very long ago, so obviously like how do you explain that? Because we're not sure if she knows that I'm her sister or she just knows me as someone that's always been with her kind of thing... she lives with her aunty and uncle...so it's like how do you explain that to a four year old? I don't know. (YPPG2)*

A barrister described the way in which detailed plans for contact could be just as necessary in SGO scenarios:

*I've very recent experience of a plan whereby granny was taking one, aunty was taking another and granddad was taking a third because these children had very complex needs and it was too much for one or other to have all of them. My role, I guess, in that sense is to understand what is first of all being recommended. Is it something that the carers are happy to do? Can they manage it? Is it logical? Is it too onerous? Is it too strict? Is it too boundaried? Is it unrealistic? Is it forgetting the fact that these are all family and if they all want to get together every weekend and have dinner every Thursday then why on earth shouldn't they? But sometimes it's the other way round. You're saying, you know, this person works. They've got this child to look after. They've got children of their own and yet you want them to every Saturday also find time?...So my role is usually to sort of try and put the practical reality to the plan. (Barrister 5)*

*...And I mean you would want in the event that children were split to have as part of the special guardian support plan the contact and you could consider in those circumstances making an order if you weren't too sure but it should be in the support plan. (Judges Focus Group)*

## Section 20

Where a child is accommodated under Section 20 of the Children Act 1989 and a sibling remains with the parents it cannot be assumed that inter-sibling contact will take place. Moreover as Bainham (2015) has identified, the provisions relating to contact when a child is subject to a care order do not apply where professional intervention is more limited. The use of Section 20 has recently been the subject of a review by the Family Rights Group which highlighted the consequences of its use in unintended ways (FRG, 2017). The potential for drift, the lack of oversight and the misuse or abuse of Section 20 was raised by our guardians.

*Well I don't know what they're doing in that because sometimes you get involved with a family where a Section 20's been agreed and things aren't moving so a child can be in care for maybe a year. Well they're going to be in care at least six months before the IRO reviews that...if just say one child is with her parent or with a relative and another child's in care, it does have huge implications because there's no formalised contact arrangement or things like that. (Guardian 1)*

*I think the problem with Section 20 is... and I think it's changed because of recent case law and the misuse of Section 20 but, gosh, the amount of times I see parents who are really vulnerable, who don't really know what's going on...and it means that people don't get to see their children, siblings don't get to see each other and actually there's a complete imbalance of power and the parents have no rights and so they might not see their kids and siblings might not see each other and an older sibling at home might not see their sibling. (Guardian 4)*

When one sibling is accommodated but others remain at home, the professionals indicated that the barrier to contact between them was often the result of conflict between parents and the accommodated child.

*...I've had two children where the eldest child is deemed and perceived by the parent as the problem and then the parent's been quite punitive towards that young person and has punished them by saying, 'You're not going to have contact with your siblings'...we had the first hearing and the judge made it very clear that...he expected the parents to cooperate and allow the children to see each other and actually any of the parents' objections that the eldest child was a risk to the younger children could be managed because they would have their contact...facilitated. (Guardian 4)*



*I think one of the dynamics that's more tricky, though, and I'm thinking about older young people who come into care quite often because of being 'out of control' when they've got quite often a much younger sibling and the parent doesn't want that older young person to have contact with their sibling because of safeguarding influence issues and that's very difficult to manage because actually you haven't got any sway over that really apart from trying to facilitate relationship building, but it's much more tricky. (IRO South Focus Group)*

Where siblings were accommodated separately under Section 20, there seemed to be greater potential for ensuring contact happened.

*...they ideally would be placed together, however, if there was more than one or more than two and we did split them up, we would promote that with the foster carers that they were placed with...so we would often write it into that child's plan to say X will have contact with Y every Saturday at such-and-such or once monthly and that will be facilitated by the foster carers or a family worker from our authority. (IRO North Focus Group)*

One IRO recounted an example of just how complicated some Section 20 scenarios could be. In this case, an order was considered to impose sibling contact.

*Three children have come into the care system at different times and I am the IRO for all three of the children. The two oldest boys are in separate placements. They were having contact but the younger of those two didn't want to see his parents or his other siblings who were still at home at that time, so the parents, because it was Section 20 rather than a care order, said, 'Well the two older boys can't have contact. We're refusing that'. So we recommended, you know, about thinking creatively – and I hope this is okay – to go for a specific order to enable those siblings to have contact because it was just so unfair that the parents were punishing the children who obviously got a lot of comfort from seeing each other and the foster carers were facilitating that in a really good way. Luckily it didn't have to go to that because then another child came into care and they agreed to them having contact but it's just about thinking creatively to enable the child to get what's in their best interests. (IRO South Focus Group)*

## Adopted and non-adopted

While most respondents described a presumption of contact for separated siblings subject to care orders, there was a counter-presumption that this was highly problematic when a younger child was adopted but an older sibling was not, the problem usually being attributed to the older child's continued contact with the birth family.

*...so you could have a scenario where...a sibling group is separated by foster care and adoption and of course if it's foster care for one of them, there's more likelihood of there being parental contact. Though if that's the case, if parental contact is said to be important, then it's likely the sibling who's adopted isn't going to have sibling direct contact because that brings the security risk into play. So either you're going to sacrifice parental contact or you're going to sacrifice inter sibling contact. (Barrister 3)*

The fear that the older child with continued birth family contact will compromise the security of a younger sibling's adoptive placement dominates discussions of sibling contact. The judges in our focus group thought that there was a lack of interrogation of this assumption.

*J1:...I think local authorities pay very little attention to what sort of contact is going to take place for the best interests of the child after the final orders have been made. It's all effectively oh well, you know, 'they're still seeing this person so they can't see each other' and 'they can't go there because that child is adopted and that one isn't'. They just don't go into it.*

*J2: It's too difficult so they don't look at it because it's too difficult to balance.*

*J1: And there's a huge absence of common sense...They've got templates of what they want to do and an assumption.*

*J2: If you are separating children, there is always an assumption, and it's trotted out that contact with older siblings is just not going to happen because of compromising the security of placement. It's trotted out time and again...(Judges Focus Group)*

Some felt that things were changing, with a greater willingness by professionals to push for post-adoption contact.

*...and I don't know whether this is just my perception but certainly more of an expectation now that efforts will be made to try and promote direct sibling contact post adoption or that you will try and find adopters who will do that...at least now the question's being asked and people are trying to find adopters who will promote it. But as I said, the difficulty is it's how do you manage that scenario where the older children who are still having contact with their birth parents...(Solicitor 10)*

*...we are told, I don't know whether there is any evidential basis for this or not, that most adopters will not look kindly on the idea of inter sibling contact with a child who is continuing to have a direct relationship with the birth family...I sense that in more recent times there is more of an appetite to challenge that... but it's certainly something that is still presented as an issue and a reason why in a care plan if you've got children who are going to be separated and the plan is adoption, then if the care plan is that there shouldn't be direct contact, that is what will be said. (Barrister 4)*

We explore the attempts to ameliorate assumptions about birth family contact undermining adoptive placements in Part 6.3.

## Multiple adoption placements

Where two or more siblings were placed in separate adoptive placements, contact was thought to be more possible and this is supported by other research (Neil, 2018). But this was also described as being beyond the purview of professionals whose involvement ceased at the end of care proceedings.

*...I mean in the circumstances I described of siblings being adopted by different sets of adopters then the care plan would be that there be continuing contact facilitated by the adopters and the reason for that clearly is that the perceived benefits of having contact but also no disadvantage because the adopters aren't going to compromise each other's confidentiality. (Barrister 2)*

However, they also said that there was still no guarantee that contact would go ahead in such a scenario, primarily because of the dominant assumptions about adopters' rights, which we examine in more detail in Part 6.3.

## Subsequent babies

Cases of successive adoptions of babies from particular mothers have achieved a high profile in recent years, notably associated with the PAUSE programme (Broadhurst et al, 2015). The birth of a sibling to children already in care raised complex questions of whether the new baby would be told of their siblings and whether contact would be facilitated. In this scenario, a contact session is proposed 'for identity purposes' even though contact over the longer term is not resolved.

*Well the recent case actually, the four older siblings of the baby born in the care proceedings, the plan was there would be at least one session of direct contact for identity purposes because these children knew they had a baby sibling and it was a question of how to deal with that in terms of life story and identity on the basis that it was likely the child would be adopted...And all the evidence suggested that the older siblings were intensely interested in the baby and really did want to see the baby...it was thinking about it in terms of their lifelong experience, so when they're older what will they think and feel about that and how can the care plans work around that. And the guardian was very aware of that...Now of course if the child is adopted, if the baby's adopted which is what's meant to be happening, it's very much up to the adopters but you'd want them to be aware of these older siblings, full siblings, and think about the possibilities. (Solicitor 2)*

In the context of a baby, where other siblings were in a placement under special guardianship an IRO expressed concern that setting contact during proceedings failed to provide the flexibility to adapt to the changing needs of the developing child throughout their childhood.

*...the IRO role is quite important when a new baby comes along because it's quite easy, particularly if the baby's going to be placed for adoption, to almost not consider, because they've never lived with the siblings, not to consider contact with siblings. And so recently I've had a case where a kid is with special guardians, a new baby's come along and is going to be adopted, so one of my suggestions or recommendations is that they need to... for the adoptive parents, prospective adopters, to meet the special guardians so that they can have meaningful contact. You know, at the moment it's just letterbox*

*contact, but when their kids are old enough that they can actually think about promoting sibling contact face-to-face...For me one of the blocks isn't necessarily the adopters, it's the adoptive worker. (IRO South Focus Group)*

The need for 'flexibility' is frequently used as an argument against the making of contact orders (see Part 5.5), so it is interesting to note that care plans can also be seen as too rigid. This finding reinforces the importance of the role of the IRO in reviewing contact arrangements, which we examine below.

## Details of contact

One of the arguments for not making orders (explored in more detail in Part 5.5) is that details of contact are laid out in the care plan. Before making a care order the law is clear that the courts are required to consider contact arrangements and invite comments on them from the parties (CA 1989 s 34(11)). The case law review indicated that while contact arrangements are addressed in care plans in compliance with this provision, they were rarely the subject of further discussion. An exception was in a recent case where a judge was critical of the lack of attention to contact arrangements and where the Court of Appeal upheld a decision not to order a placement:

*It is also of relevance in my judgment to note that sibling contact had not played any part in the LA's care plans prior to the hearing and in her evidence the LA social worker said that the sibling relationship was taken into account by the authority, but would not be an overriding consideration, and that an adoptive placement would always override such contact in the authority's thinking. It seems that the social worker agreed with the judge's impression put to her that inter-sibling contact was only an 'aspiration'. (H Borough Council v CDP, MA, RD, T, F, D, P, M, H [2015] EWCA Civ 1021, at para 85).*

In the interviews it was widely remarked that while contact details were usually set out in the plan, they were more minimal than they should be and/or overly formulaic, with a lack of consideration given to how contact would work in practice for specific groups of siblings. There were also reports of varied practice.

*...in my experience the weight on sibling relationships, sometimes there's a couple of lines. That's the thinnest part of a care plan for the court...If they're not living together, again, very little thought is given to contact, their relationship, maintaining their relationship. That's been my experience throughout. (IRO South Focus Group)*

*I suppose sometimes it's very detailed, well thought-through, other times...for whatever reason the social worker hasn't really thought it out a great deal at all...The social workers that are overwhelmed, inexperienced, you know, probably their whole care plan is shaky...So that would include the issue of siblings. (Guardian 4)*

*If it's just indirect contact, 'there will be indirect contact three times a year', that's a one-liner. If it's, 'there will be direct contact to be facilitated by the foster carers three times a year', it's a two-liner. The more complicated it is, you'll get sort of two lines per scenario, so if there's...I've had children who are in three different placements for example so then that will be addressed slightly more fully but you will find yourself going this is all just...there's a lack of substance there for someone to follow. (Barrister 5)*

Some professionals stressed the need to consider sibling contact separately from parental contact:

*...if there is separation of siblings then there is some proper attention given to what the plans are going to be for inter-sibling contact, you know, over and above any issue about parental contact....and that's one of the advantages of having the separate representation for the children because certainly that is something that would be high on my agenda if I was in a situation where I was acting for children. (Barrister 4)*

In one case, raised by an IRO, it was not separate consideration of sibling contact that was needed but actual separate contact sessions:

*I think quite often if a sibling's at home with parents there's just an assumption that contact is attached on to mum and dad's contact which can be really difficult. I've got a case at the moment where the kid's in long term care and whenever he goes to contact with mum and dad the siblings are there and he doesn't get much of a good experience with mum and dad because they're too busy looking after the little ones... then he gets frustrated with them so that's really affecting his relationship with his younger siblings so*

*we've tried to talk about whether we have separate contacts but we can't facilitate separate contacts with siblings because mum and dad, because of their age, and because we would need mum and dad there... And I'm just wondering if that's why contact for siblings is not put in, because it's just attached.* (IRO South Focus Group)

## Creative contact

Many of the professionals spoke of the need for more imaginative, creative ways of thinking about contact, developed with the particular sibling group in mind. This might include using technology (see Part 6.3), avoiding overly formal or supervised contact settings, and maintaining flexibility over time so that contact could be adapted to children's changing wishes and needs. There was also concern that setting rigid contact arrangements during proceedings failed to provide the flexibility to adapt to the changing needs of the developing child and to the particular circumstances of complex placement arrangements, potentially placing unhelpful pressure on foster carers, special guardians or adopters.

*One of the issues I found with assessments and the...contact issues in proceedings is the huge reluctance of a local authority to organise contact in creative ways so that they can fully assess what the different dynamics of all these relationships are. They often say well siblings are having contact together with mum at this time and that's how it's going to be and it's very difficult then to assess, well, what is the relationship between the siblings? What is the relationship with the parent and how that's impacting on the siblings? And whether or not a different grouping of siblings could be parented by that parent and a reluctance to pull apart the family dynamics within proceedings, again, lumping the siblings together. I had one case where I did...'Well go and do something different with contact and see if his mum can parent these different groups and how the siblings react to having contact as different groupings'.* (Judges Focus Group)

*You get children, a proposal that they'll see four different people 12 times a year and I say that's 48 times a year out of their foster placement, how's that going to work?* (Judges Focus Group)

The calls for more detailed, imaginative or creative ways of thinking about contact seemed to reflect an interest in contact being more 'natural', for example, organised between foster carers, happening without the presence of a social worker and not in a contact centre.

*...let's say they're in family placements, I'd be saying, 'Okay, look, for the first maybe three / four months it's going to be this' and it may be that that's the time they need to settle into their placements and, you know, I would say to them 'try and be creative about contact. It doesn't have to be face-to-face. Could it be Skype? Could it be telephone? Could it be whatsapp?' Technology to some extent now can be quite helpful in those circumstances. And then, okay, then, you know, stick a date in for a review. Thereafter perhaps once things have settled what would you be looking at? You know, and then is there any support financially or otherwise that you could be giving to them to make sure that contact is a positive experience?* (Solicitor 4)

Some of our young advisers had personal experience of how contact worked in practice and expressed strong views about how unsatisfying it could be, especially where it took place in supervised contexts, such as contact centres.

*I think things like that are quite forced as well because normally it's in a contact centre so I know when I had that with my little sister she was only two and a half...so I had to like sit down and it's obviously very like babyish. Like I had to like sit down and read stories and play with little baby toys whereas I'd much rather have her come round and watch a film with her or take her to the park or something like that and it was, like, you don't really get that chance...You feel like you have to just stay there and you can't really talk about like family situations or stuff that you want to talk about because they're [contact centre staff] just sat there like staring at you.* (YPPG2)

Another adviser commented,

*I think sibling contact is a lot different to actually spending time with your brother or sister...It's like patronising because you feel like you have to do something to look like you're...It's when they like start writing stuff down...It feels very fake.* (YPPG2)

The need for sensitivity and flexibility was evident in this social worker's account:

*...a teenage boy who wanted to see one of his other siblings but didn't want to do face-to-face contact with his sister...he was about 15 and she was eight...because she's autistic and he said that when he got there he never knew what to say to her. He really struggled with that. And he also didn't want to travel because he was one end of the country and she was the other...But they send each other pictures and they do Facetime and that...(Social Worker South Focus Group)*

One IRO thought things had improved with regard to supporting contact.

*...now there is more emphasis on thinking about the types of contact, how you're going to get the best out of contact, how to front load therapeutic intervention so most of the foster carers if it's, say, long term care or they're higher end foster carers that come with a therapeutic training package. (IRO North Focus Group)*

But this was not in line with the experience of another IRO from the same region.

*So that's not my experience and that's not the experience within the two authorities I've worked in. (IRO North Focus Group)*

An IRO also said that it was important for young people to see details of contact in the care plan.

*...so often it drifts and I think as an IRO we have a duty to look at it and put the timescale in the plan because otherwise it just drifts and drifts and drifts....And that's important for the young people; am I going to see my brother this week? Am I not going to?...So they can see how often it is, where the contact is and how it's going to be actually managed. (IRO South Focus Group)*

## Professional scrutiny of contact in the care plan

### Judges

From the judges there was a sense that scrutiny of the care plan was necessary to force a break from formulae and templates and to consider the individual needs of the family.

*And it does show how important it is that those agreed amendments to the care plan are actually put into the care plan because otherwise there is nothing to review and there's no proper aide memoire for anybody about what was supposed to be the starting point. (Judges Focus Group)*

*...the almost standard proposition of children who are permanently in alternative care is that parents should have contact perhaps six times a year and often the children are all lumped in with that and my first question is well 'why can't the children have greater contact between themselves?' If they can't live together they should at least be seeing each other on a much more frequent basis...And all of a sudden the care plan gets changed. (Judge 1)*

### Guardians

Guardians were named by all our interviewees as the professionals most likely to question, challenge and probe sibling issues in care plans. They were sometimes talked about as being more tuned in to siblings as an issue, and as strong advocates for keeping siblings together or, if not, maintaining contact between them.

*I think it's been led by a couple of guardians who are very keen and hot on sibling relationships in terms of care planning and they have been asking for sibling assessments at the first case management hearing...I wouldn't say there's a change of culture but they are more frequent...with more requested and therefore that inevitably informs the care planning and you get better care plans because you've got proper assessments on which to plan (Judges Focus Group)*

*I can't think of a case that I've had where a guardian hasn't commented on a sibling relationship if that's a feature of the case...(Solicitor 9)*

Guardians and others saw it as their role to challenge the local authority on plans for siblings, to the extent that they might challenge a care order, but may also be pragmatic and recognise the lack of suitable placements. The contribution by guardians who take a proactive role in questioning care plans was identified as crucial, in particular by the judges. As one noted, when guardians are 'very keen and hot on sibling relationships...you get better care plans because you've got proper assessments on which to plan' (Judges Focus Group).



However, concerns were expressed about the changing capacity of guardians to fulfill this scrutinising role. Guardians were as concerned about this as other professionals. Some mentioned the pressures of their workload:

*I've got 20 cases. I haven't got time to be going through everything in detail in my reports. (Guardian 2)*

In our interviews, the guardian role was described as having been diminished to a less 'hands-on' one; one of a 'floating overview'.

*They've tried to streamline everything and I understand that you don't want big wads of reports and loads and loads of evidence, you want more analysis and you don't want a load of narrative but you want analysis but I still feel that the child has a right to some sort of the narrative about their life at the most crucial time in their life when they're going to be separated from their parent and they might never go back to that parent or see that parent again so I think that's a very important document and it's been really decimated and really made to be a very different sort of document. (Guardian 1)*

Limitations on the time guardians can spend on cases were described as having a particular impact on their ability to look at social work files to find out more about a child's background, including investigating additional or missing siblings and mapping out relationships between them.

*Our caseloads are such that you skim the surface. I don't think that's to do with the fact that, you know, younger children's guardians aren't competent and experienced but, you know, you just cannot do the work that you...I mean when I was a social work practitioner, you would get children's guardians would come in and physically read files and that they would really understand. I couldn't ever do that, not in a million years. I'd love to because I think, I don't know how has the local authority done these things?... Although I have the powers to go and read the files, unless I chose to do that in my own time I couldn't possibly do it in the work's time. (Guardian 4)*

*They had so many good people leaving that they've just employed a whole new load of guardians and so most people have now got sort of 16 / 17 cases. But, you know, I get up to 24 / 25 cases and it's just you can't work properly. You don't have time. All that stuff talking about siblings and talking to this one, that one. You're literally just doing what's needed. (Guardian 2)*

*J1: I think the worrying thing is that a lot of the really experienced guardians are retiring and the new breed have too many cases and they don't have that breadth of experience and neither do the children's solicitors. It's much more superficial approach.*

*J2: They don't have the commitment either, I think, which perhaps is personalising it but the commitment seems to be lacking when I've asked for things to be done. There isn't the same sort of response. (Judges Focus Group)*

Additional problems mentioned included rapid turnover and a shortage of staff in some regions, a bureaucratic 'tickbox' culture and the new requirement for what some described as a guardian's report with a less 'holistic' assessment of the child. A number of guardians and other professionals described a blurring of important boundaries, between the guardian's independent status and their relationship with the local authority, for example, with guardians getting involved in the oversight of care planning.

*...normally the guardian has endorsed what the plan is...I was a care lawyer and a children panel lawyer in the good old days when guardians were independent, they worked from home...and they were very experienced, very tough social workers and so they were completely independent and they would do huge amounts of work. They would be visiting kids, seeing them. They'd get to know the family. Now Cafcass, for their business model...they see themselves very much as a floating overview and so what they're doing is they're assessing papers, they're looking at assessments, they're doing some hands-on work but they're not a hands-on force. You know, they do a different role to how it used to be done in the old days. (Judge 3)*

These concerns were often articulated in the same terms: a shift from 'old school' guardians described as being confident in challenging local authorities, to a 'new school', described as less confident and sometimes less competent, as well as being hampered by Cafcass's 'proportionate working' framework. This perhaps echoes earlier commentary within the sector (Community Care 2013).

*I think probably children's guardians are a kind of younger, less experienced...I mean at one time, yeah, I think children's guardians were kind of longer in the tooth. I think there's still a bit of a mixed bag. (Guardian 4)*

*...there's such a variance in professional standards. I would say what we refer to as 'old school guardians', guardians who have been around for quite a long time, they really...they tend to make more enquiries, like they tend to visit the children, speak to the social worker...see the children and speak to the foster carer, speak to the schools. You'll get other guardians who'll be much more reliant on what the social worker does so it really varies. (Barrister 1)*

*....some of the younger, newer guardians have been brought up in this environment of... What's that delicious euphemism that Cafcass has? 'Proportionate working'. And so, you know, they don't really know any better...of course most guardians for however short a time were social workers and probably know, you know, what is appropriate and can, I think, sometimes feel a bit uncomfortable about not being able to carry out an independent assessment but I think the rationalisation for that is, well, the role of Cafcass is simply to comment on the quality of the assessment rather than to carry out an independent assessment. (Barrister 2)*

*....now we have the concept of proportionate working, the great increase in care proceedings has meant that the things that we perhaps used to do we don't do. And whereas I would see a lot more people face-to-face, I don't think there's an opportunity to do that so much now. And Cafcass are saying where possible not to repeat what's already been done but that can mean that you are taking for granted what the social worker's saying and they may not have made the exploration. (Guardian 3)*

Nonetheless, the guardian was described as playing a central role in scrutinising contact arrangements in the care plan.

*Well very often it's been picked up by the guardian. If you've got a good guardian they'll in their report highlight the deficits if you've got a good guardian...quite often the local authority will try and address it. Other times they won't and you'll have to beat it out of them. (Judges Focus Group)*

*I actually feel that I can affect change more as a guardian than I could as a social worker. (Guardian 2)*

*If the guardian's worried about it, sometimes what we'll do is say, 'look you need more detail, can we actually see it written down what this looks like? Is it going to be in school holidays? How is it actually going to work?' (Solicitor 7)*

The guardian role was seen as crucial to sibling relationships, but there were substantial concerns with the ability of the current system to allow this role to be performed. We will see a similar theme arising in the discussion of IROs.

## Establishing contact arrangements during proceedings

A number of reasons emerged from the interviews why establishing long term sibling contact arrangements during care proceedings might be problematic. First, that there is limited time to discuss such arrangements. Second, that the focus of proceedings tends towards the parent-child relationship. Third, that during proceedings, sibling relationships are highly likely to have been disrupted and therefore assessing them and working out plans for the future may be reliant on observations of atypical behaviour. Fourth, prior to a permanent placement being assigned, it could be difficult to pin down contact arrangements.

*...these children won't be in a long term foster placement at the end of the proceedings so you can't say right, okay, they're going to be in a long term foster placement either together or if they're not together then these are the plans for contact. You could say that but you can't dot the Is and cross the Ts because you can say all right, we're going to have the two older siblings together...but you're not going to say well he's going to live with Mr X and they're going to live with Miss Y and that's where they live geographically so therefore they're going to be able to have contact three times a year / four times a year. You're talking about an aspiration when you're filing a care plan...it's a hope...It's just the nature of the proceedings because clearly you can't look for a long term foster placement where there is still a possibility that they might be going back to the parents. (Solicitor 3)*



A guardian was concerned that a lack of detail in the care plan made it more difficult for professionals and carers to be held to account for making sure contact takes place after the end of proceedings.

*...when children have gone into separate foster placements and, you know, it might be several months in; 'oh has there been contact between the siblings given that they're in foster care?' 'No, we have asked the foster carers to sort something out. We've asked the foster carers to facilitate something.' 'we've not got round to doing that yet' well, I think that should be an expectation upon foster carers that actually it's a requirement, you know, you do it. It shouldn't be a goodwill gesture that we'll try and get the siblings together... it's just left with the foster carers who invariably have got busy lives and might not give it the priority that it should have...Probably because it's not really detailed in the care plan...You know, however important their lives are and looking after that child, they really do need to remember that, you know, they are siblings and they may be returning together or, you know or things like that. (Guardian 4)*

*SW1: I think sometimes once the care proceedings and all those kind of heightened emotions, when reality sets in I think then there is a reduction in contact and sometimes that's because children, for instance, if they're in separate foster...they're settling in, they've got after school clubs, you know, it's...I think then because daily contact isn't always feasible on and on and on so I think then it could be maybe fortnightly or monthly and then that's the reality of what contact's going to be and life's going to be like but I think when there's like care proceedings going on, because of everything's being scrutinised and looked at, I think that's when the highest level of contact takes place.*

*SW2: They seem...The actual rota and the dates and the hours, that seems to take up quite a lot of the end negotiations around the end of the care proceedings. It seems to take up a lot of energy to negotiate how well what's going to happen after the order and for how many weeks is it going to be this and then it's going to reduce to this ... and I think the other complication to all of that is where we've got one or a number of children with a plan of adoption then the adoption workers' angle on contact is different because they're thinking I've got a responsibility to help prepare this child for moving to a new family, I'm ramping up my direct work to get them to understand that there's going to be change. Part of that is going to be understanding the reduction in contact and finally saying goodbye and so that...You know, if you've got if proceedings end and you've got a fairly stable plan that you can see can be reviewed periodically but that's going to be it, that's one thing, but where you've got maybe one or a couple of children with an adoption plan, you've suddenly got a worker saying, "Well hold on, we need to reduce this down and end it on such-and-such a date because I need them to have a gap or a whatever. I need to get them in a mindset that's going to prepare them for moving." (Social Worker North Focus Group)*

However, all professionals, except IROs, note that their role ends at the conclusion of proceedings and so their oversight has to happen within the required 26 weeks (or longer, if delayed). Many interviewees mentioned the need for some continuity of personnel during and post proceedings and discussed the benefits of reviewing contact arrangements when placements have settled down thus bringing to the fore the role of the IRO.

## 5.4 After proceedings

### The role of the IRO

We explored some of the issues which arise with maintaining sibling contact over time, and particularly important here is the role of the IRO in reviewing contact arrangements after proceedings have ended and throughout the minority of the child in care. According to one of our young advisers, 'bonds can drift apart' (YPPG1) when siblings are separated and the importance of professional and legal oversight to ensure that this does not happen was not only very clearly articulated across our professional interviews but is also explicitly acknowledged in the legal guidance concerning the IRO role. Despite this, most of our young advisers were unaware of what IROs are supposed to do; amongst those who were looked after and had probably been assigned an IRO, this was sometimes because they were viewed as 'just another social worker' who visited and asked personal questions.

### What the guidance says

The guidance (DoE, 2015: paras 2.85–2.94) makes very clear the particular role of the IRO in 'monitoring changes in need' of siblings as they reach the end of care, including their wish to 'move away or return to live

with siblings'. It also makes clear that the role is underpinned by the statutory duty for the care plan to 'set out arrangements for the promotion and maintenance of contact with brothers and sisters, so far as this is consistent with the child's welfare'. They are assigned an 'active involvement' in facilitating contact 'in a way which supports the development of healthy sibling relationships between children who are not able to live together', including supporting them in understanding why they cannot live together, ensuring that contact arrangements are 'given very careful attention' and that 'plans for maintaining contact are robust'. It goes on to state that contact:

*...must be meaningful and take place where children feel safe and supported. The wishes and feelings of children about where they want their contact to take place and who they want there should be ascertained, as well as the views of children's carers.*

In addition, they have a role in ensuring that children and young people,

*understand the contact arrangements in place and are fully supported to understand the reasons for contact not happening, including when arranged visits are cancelled.*

And in ensuring that 'contact is a positive experience for all siblings', it acknowledges that arrangements 'may need to be varied as the children's relationships and need for contact change over time'. If contact stops, it should be 'regularly reviewed' and 'children should understand that they can change their mind'. In the event of problems with contact, children should 'be supported' if they wish to maintain it.

However, a significant finding is that despite the very specifically established remit of IROs in protecting the interests of siblings, they were often the subject of harsh criticism from other professionals. This echoes wider critical discourse in the sector about the role and its implementation (Narey and Owers, 2018; Puffett and Lepper, 2018).

One of the judges in the focus group disparaged IROs as 'pretty useless', a view supported by others. Some lawyers criticised them for a lack of independence from their local authority employers and failing to challenge social workers or being insufficiently proactive when the local authority does not act on contact arrangements in the care plan. There was also a concern that they were overly reluctant to refer cases where contact was not taking place to Cafcass legal or back to court. (See further in Part 5.5).

*I mean a lot of people will tell you, and I don't think it's an excess of cynicism, but the really highly dubious aspect of IROs is whether they are truly independent. So a lot of them are employed by local authorities and although they may be formally separate from the case work in a particular case, the extent to which they are truly independent I think is highly questionable. It would be interesting, you know, to see what views you receive but I suspect that generally speaking there's a somewhat baleful view of the role of IROs. (Barrister 2)*

But it was also acknowledged that IROs were over-burdened with cases, suffered from a lack of resources and some professionals did appreciate their work 'behind the scenes'. One barrister said they have become more significant in recent years, as a check and balance on the local authority's process. And some guardians reported that conversations and disagreements with IROs were fruitful. Some IROs were said to be very good at encouraging young people to contact them if they are dissatisfied with contact. Significantly most said that the IRO role was important and should be strengthened; the problems lay with practice.

*It ought to be reviewed every...three months to start with and then every six months at the LAC [Looked After Child Review] and looked at in a real way rather than just reaffirming the care plan and I keep saying, 'Please show my judgement to the IRO so that they know what sort of remarks I've made about contact, whether it's parental contact or sibling contact'...the Independent Reviewing Officer...carries the care plan and has the responsibility to implement it. (Judge 2)*

*I don't think the envisaged role of an IRO as being a proactive role in effectively overseeing the implementation of a care plan has ever, apart from in very few circumstances, really been properly operated. (Judges Focus Group)*

### IROs' own views

It is instructive to contrast other professionals' views of IROs with the IROs' views of their role. They were very clear that key to their role was ensuring that the care plan meets the needs of the child and that this includes

siblings and sibling contact. Some considered that they were the only professional with a holistic view of the child, from the start of proceedings to beyond proceedings and had a key role in ensuring the child's right to family life is taken into consideration. They raised an issue with information being lost from one social worker to the next, making the IRO's role more difficult but also more important, for example, it was noted that new social workers can turn to the IRO to get the child's story. The IROs saw themselves as possibly the child's most consistent professional, which is particularly important for siblings.

*It's outlined in the care planning regs...there's a big section on it and that, in my opinion, is the role of the IRO, which is why we should keep it on the agenda at each review and each audit that we do. I think sometimes the difficulty is that it can get lost with the social worker...the turnover of social workers is absolutely horrendous...it gets lost...the relationship with the social worker becomes even more diluted because this is the fifth social worker in as many months. So I think it's really, really important that we understand what our role is in terms of care planning. (IRO North Focus Group)*

They recognised that others struggle to understand their role and acknowledged the confusion between scrutiny of the care plan and case managing, expressing concern with losing their independence by being asked to attend local authority meetings. They too talked of their caseloads, which far exceeded those recommended in the IRO handbook. Interestingly, they thought that in some cases they had more contact with the child than the social workers did. During care planning, they said they had a duty to prevent drift by putting a time-scale into the plan and, with the guardian, a role in establishing the child's views on sibling contact.

In scrutinising the care plan and its implementation, the IROs were keenly aware that they might be the only professional attuned to the changing needs for sibling contact over the long term:

*...you're looking at some children's care plans and they've been in care for donkeys, 10 years, where the risk, you know, at the age of four would have been massively significant and at 14 that risk pales into insignificance, but nobody's reviewed, taken the time to actually look at the relevance of the risk and 10 years on actually does that really still fit now for that child?...often these kids have just got a care plan that it's like it's in a tablet of stone and and that's what it's going to be and that's it. (IRO North Focus Group)*

A social worker thought there had been changes towards more proactive reviews of contact arrangements.

*Gone are the days where we would put a child into foster care and that would be shelved and left where it was. We are continually assessing those care plans for children and that is contact as well, it's continually assessed and it can progress, so you can get more, you know, sort of a better quality if that's in the right interests of the child. (Social Worker North Focus Group)*

In this case, an IRO had a view that it was possible to work towards an older sibling taking on responsibility for a young children, requiring changes in contact arrangements.

*There were six children. Three of them have now left care, three are still looked after and I reviewed the fourth and the oldest sister who's now 22 wants to look after them. And she can only look after one child at the moment but it's caused ructions with the foster carer. This little girl is saying I definitely want to be with my sibling. And once again if you look at the care planning regs, we need to promote this. There's no reason why this child...she's going to have a connected carer's assessment, there's no reason why this child can't. But equally, as siblings get older and there's no issues, there's no reason why siblings can't have unsupervised contact with them and that's a massive issue as well. (IRO North Focus Group)*

However, the extent to which the IRO has the 'teeth' to make contact happen was queried (see discussion of this in Part 5.5).

## Contact in practice

Difficulties in contact could result in the 'drift' spoken of at the start of section 5.4 by our young adviser.

*I have seen cases where contact hasn't taken place...And it's not for a terrible reason other than there are other things that perhaps have taken priority that maybe shouldn't have taken priority or whatever and then, you know, once children haven't seen each other for six months or a year, well, the relationship it's quite difficult then to pick up that relationships, isn't it? (Solicitor 3)*

Other young advisers mentioned the problem of siblings being placed miles apart posing obvious time and resourcing barriers. But another raised how even indirect 'letterbox' contact could fail, commenting that it 'never ever works', recounting how 'they send something through and it never gets to you' and, shockingly, how a letter meant for her went to this other girl'. (YPPG2). One young person commented that 'some people can...only write letters every six months which I think's just weird and ridiculous' while another criticised the fact that these constraints on frequency meant that she had to write letters at prescribed times, 'then it's like pressure'.

An older sister commented that she had only twice seen her much younger half-sister, who was four, but had met with professional inertia when seeking contact.

*So recently I asked to see her and my mum rung her social worker and the social worker was on leave so my mum rang again and she answered the phone and she said she'd get back to her but she just hasn't so it's like she can't be bothered to like do what she's supposed to do. It's like she's, 'well I just can't be bothered to do it so I won't'. Obviously I know..they've got really busy jobs, but my sister's four and she's never really met me so we haven't got that sibling bond like I have with my other brothers...I feel like I want to see her because if she gets taken away and then when she's older I try to find her, she might think that I never really cared about her when she was younger so I think personally that the social worker should actually give more time because she just hasn't been bothered and it's been two weeks and nothing has been sent back. (YPPG2)*

In the interviews with the professionals, resources emerged as an important issue in the maintenance of contact over time. Some of our social worker interviewees were closely involved in sibling contact:

*It's a bit of a resourcing issue around contact as well because we've got...I've got 17 cases at the moment...and then with contact we do supervising and if the foster carer couldn't do it, we're meant to do it, which obviously we've got limitations...I mean if it needed to be supervised by us it's a real resourcing issue, sibling contact. (Social Worker South Focus Group)*

But other professionals were also aware that maintaining sibling contact could be costly for carers.

*I have a case at the moment where, again, five children, three different fathers...they're now separated into three separate settings. Eldest remains at home with mother. The youngest has gone into foster care. Middle three are with their dad. And whilst we're in care proceedings, every Saturday there's a sibling contact. I can't see for practical reasons that unless the local authority continue to arrange and fund that, that that will continue post orders...so at the moment the children are collected for contact, they're taken to contact, they're brought back from contact, it's funded. (Solicitor 1)*

Issues were not always resource-based, they could also be subject to the pressures of time which could be a problem for carers:

*The carer may take on a child quite quickly because they're removed and told there'll be contact maybe three times a week...and then there's the sort of conflict between the carer saying, 'well I can only manage this, because I've got other family commitments'...may have other looked after children who've also got their own contact arrangements so it can get quite messy and complicated. (Social Worker South Focus Group)*

Time could also be a problem for children:

*So every single night after school driving and particularly like obviously based in a city, driving through a city getting to contact and then, you know, and the majority of children in that child's class would go home, have their tea, do their homework, you know...they need a night where they can go to football practice and contact can't be on football practise because football practice is really important for that child and in my experience that's all understood you know, and there isn't any resistance to that. (Social Worker North Focus Group)*

In the following section we explore what legal measures are possible to make sibling contact a reality and why they are under-used.

## 5.5 Section 34 Orders

### Introduction

*Well that's part and parcel of the whole idea of, you know, court being a last resort and no order principles and that sort of thing so I think...I can't say to you I think there should be more applications. What I would say is I think it's a concern there aren't that many and are those children being given the option. I can't imagine that there aren't a lot of children in the care system who don't have gripes about the level of contact they have but should we necessarily be encouraging them to make applications and actually, what avenues do they have to sort out their contact? (Solicitor 1)*

*I have seen cases where contact hasn't taken place...And it's not for a terrible reason other than there are other things that perhaps have taken priority that maybe shouldn't have taken priority or whatever and then, you know, once children haven't seen each other for six months or a year, well, the relationship it's quite difficult then to pick up that relationships, isn't it? (Solicitor 3)*

In addition to reviewing contact arrangements in the care plans, courts also have the power to order contact between siblings to take place. Such orders can be made by the courts on their own accord (CA 1989 s 34(5)) or on the application of a child (CA 1989 ss 8, 34(3)(b)), depending on who is making the application and whether or not the child is in care. A key finding is the use of Section 8 or Section 34 to order inter-sibling contact with children in care is highly exceptional.<sup>33</sup> Explanations for this provided by the practitioners vary and are sometimes contradictory. The most frequent explanation was optimistic: that orders are not necessary because contact is addressed in the care plan and facilitated by reviews and the IROs. Orders were also perceived by some as inflexible and alternative methods of resolving disputes were deemed preferable. At the same time the existence of orders, if not their use, was considered useful as a negotiating tool both in reviewing arrangements in care plans and as a threat if they were subsequently not being adhered to.

A key finding however was that judges, guardians and lawyers very rarely know what happens post-proceedings. That said, significant concerns were expressed about over reliance on care plans, the effectiveness of the IRO system and a lack of coordination between IROs and advocacy services. Access to legal advice was perceived by most as far more of a barrier than the legal requirement of applying for leave to make an application.

### Little evidence of use

*I've been here 20 years and I've never seen a child applying for contact. (Solicitor 3)*

A clear finding from the interviews is that applications for these orders are highly exceptional and orders are rarely made; some solicitors had no experience of them at all.

The case law review revealed a lack of reported decisions about section 34 applications for sibling contact and where the question of a contact order is raised, it was routinely dismissed as being unnecessary or inappropriate with little, if any, discussion<sup>34</sup>. The absence of discussion or support for contact orders in the case law appears to reinforce their exceptionality. One solicitor noted that:

*you advise them...you need to be aware that there's been very few cases so I don't want to raise your hopes. I'll do it, you've got grounds to, I think you've got leave but whether that ultimately results in you getting contact I have to say it's possible but it doesn't happen very often'. And often the older sibling will...still go for it but the majority feel they've lost at that stage. (Solicitor 6)*

### Reliance on the care plan

*It's normally just what's in the care plan that's relied on. (Solicitor 7)*

It is important to emphasise that the absence of court orders is not evidence of a lack of importance being attached to contact, but, rather, preference for alternative measures to securing it. Practitioners from all the professions referred to a reliance on the care plan and the review procedures as an explanation for the absence of

<sup>33</sup> See Strather (2012) for an overview of the potential uses of Section 34 orders.

<sup>34</sup> See eg *X County Borough Council v ZS, DJW, KJW (the child) By His Guardian v GEM*, CM Case No: CJ15C00093, 15 October 2015, 2015 WL 10382713 at para 52



contact orders. A judge noted that, 'It's not common in care proceedings because it's not usually necessary' (Judge 1). One solicitor suggested that this was based on an expansive understanding of the law: 'the local authority... they know they have a duty to provide contact so it usually happens' (Solicitor 5). Another solicitor expressed a similar view, but more cautiously: 'I would *hope* that we haven't had it because we're keeping to contact plans' (Solicitor 3). Another solicitor noted the aspirational nature of the care plan.

*What we have is a commitment and my view is that actually they – they being the social workers / local authority – are always quite keen to promote those relationships but it can depend, they do sometimes have their own idea of what's best for the child and what's not. (Solicitor 1)*

While responsibility for implementing the care plan rests with the local authority and IROs, as discussed in the previous section, some judges emphasised the importance of their active role in reviewing the arrangements for contact in the plan. As one judge noted:

*The court needs to set the framework and then it's for the local authority under whatever order to assist them in implementing that framework but I think the court should set the framework and...we shouldn't delegate that to anybody...and if it's not in the care plan, I expect it to be in the order and if it's not in the order, I expect it to be in the schedule to the order...you can chuck away the law books in a schedule. In a schedule you can talk in normal language. (Judge 3)*

As noted here there is an emerging practice evident in the case law and the interviews of emphasising the importance of contact in ways other than making a contact order which can take various forms; it can be in the plan, the order or a schedule and sometimes in the 'judgment' or in 'recitals'. As a guardian noted:

*She didn't make an order but I think she put it... it was reflected in the order in terms of saying that the local authority will use its best endeavours to promote contact. (Guardian 3)*

The value of these statements is disputed and the reference to 'best endeavors' simply restates the legal position (CA 1989 Sch 2 para 15(1)(c)). But a solicitor suggested that it could play a useful role post proceedings at review stage.

*...you couldn't apply to court to enforce that but equally if she wanted to...if there was to be any court proceedings in the future, you'd have to show good reason why you departed from what was an agreed position at that time. (Solicitor 9)*

We discuss the use of recitals and other initiatives in Part 6.

## The inflexibility of orders

*Children's needs change. If you've got it set you have to go back to court all the time and it doesn't give that flexibility. (IRO South Focus Group)*

A recurring response to the lack of orders at the time of the making of a care order is their perceived inflexibility. This concern reinforced the preference for reliance on the review process. An IRO explained the courts' reluctance to make orders on the basis that they, 'expect it to be reviewed...so I don't know that they're tying the local authority down to specific contact arrangements' (IRO South Focus Group). The concern was also evident in the case-law review.<sup>35</sup> Flexibility was perceived as being particularly important at the earlier stage:

*...the difficulty is if you make a contact order at the end of the proceedings, you will have no idea whether that's going to be practical or sustainable in terms of the dynamics...the practicalities going forward. So, you know, if you have a contact order that says the children should meet once a month and you've got one in Scotland and one in Cornwall and one in...that's not going to be practical. (Solicitor 3)*

Another solicitor indicated how concerns about flexibility cohered with an explicit aim of lawyers and the courts to avoid using orders:

<sup>35</sup> Eg, 'Both the local authority and JC believe that a degree of flexibility is necessary in contact arrangements and therefore oppose the making of any contact order under section 34 in the event that a care order is made.' *A Local Authority v A Mother, A Father, SM, AS, AB, AQ, Z, AH, AW*, Case No: PO14CO0368, 22 March 2016, [2016] EWFC 15 at para 21.



*The situation I'm used to is care proceedings where if you're in a situation with ongoing contact, the courts will generally, and us as lawyers representing everyone, will do what we can to avoid having defined orders for contact made because it doesn't allow the flexibility that you need necessarily to manage what is a really fluid situation. (Solicitor 9)*

## Child welfare concerns about courts

*You don't want kids having to go to court. It's not very nice. (Solicitor 7)*

Some practitioners suggested there is a professional 'child-centred' reluctance to use court orders and a preference for resolving disputes by alternative means. That going to court should be a matter of last resort was confirmed by an IRO:

*You would hope that before it got to court, you would hope that there would be in-house provision. So there's dispute resolution, there's an escalation process...there's the advocacy service before hopefully a child says enough's enough. (IRO North Focus Group)*

These concerns are not unique to child care proceedings and have been the subject of critique (see Part 7). But one judge explained the specific nature of the concern here:

*The problem with a contact order in public law context is that it promotes litigation which really isn't helpful in the public law arena and it fires up the parents again. So I mean if you're going to drag it back for...you know, you make a Section 34 order and it needs variation, everyone who had parental responsibility must be an automatic respondent so you're dragging the parents back in then, aren't you, and that will upset all those wounds that were there before and nobody wants to poke the hornet's nest. (Judge 2)*

Flexibility is a factor here. But the reference to the parents also indicates how difficult it is to focus on sibling contact independently of parental contact issues.

## A response to failings in the system

*...that's usually when they're exasperated with the local authority for failing to set up proper contact arrangements. (Judge 3)*

Reinforcing the overarching impression of trusting the local authority and reliance on the care plan – that orders should not be necessary – was the view that orders are only required when something has gone wrong. As one guardian noted that:

*You'd have to really mistrust the local authority to impose a contact order on them... I've never come across it, not with a care order. (Guardian 1)*

Similarly a barrister noted that:

*If a court is not convinced that a local authority will promote contact because of its conduct throughout the proceedings and say, for example, you've got children in disparate foster care placements then the court can make a Section 34 order and that's still quite rare, although I have come across that...[it is] an indicator of a fact that the care plan isn't being looked at more rigorously or contact isn't being looked at more rigorously at LAC reviews. (Barrister 1)*

A recent case where a Section 34 order was made confirms this, the judge holding that:

*I have been left with the feeling that the local authority has from the outset and throughout seriously underestimated the importance of the children continuing to see their parents regularly. In all the circumstances I am satisfied that it is better for the welfare of the children to make an order under Section 34 of the Children Act than to make no order. (Nottingham City Council v N.W. (Mother), A.A. (Father), A, M, L (children) (Acting Through their Children's Guardian) Case No.: NG15C00199, 2016, WL 08116597 at para 37)*

## Indirect benefits of court orders

A number of practitioners emphasised that the existence of court orders served a purpose, even if rarely used. As judges in the focus group noted:

*J1: I suppose in fairness, if Section 34 is mentioned within proceedings, it tends to be talked out and agreed as opposed to ever being pursued. So the threat might be made to make a Section 34 application because we're not allowing this, that and the other but actually, as long as it tends to be a reasonable request.*

*J2: We very rarely make a Section 34 alongside a final care order. I'm wracking my brains to think when I last did. It's usually as part of the horse trading... to the care plan. (Judges Focus Group)*

Similarly a solicitor noted that the threat of making a court application can be also be useful at a later stage: 'we just sent the letter to the local authority and they set it up again' (Solicitor 5). Another suggested explanations as to why the threat of an application might suffice included a litigation-averse approach which also indicated a possible awareness of the concerns about contact by the judiciary:

*If you get children making these applications I think you will get judges that are very cross about what's been happening in long term foster care and why these children haven't been...And I think, you know, you're potentially going to be bad publicity and you're going to get cost orders in terms of those applications. (Solicitor 3)*

## Lack of professional continuity and access to advice

*I think like, the case closes and that's it, off they go. (Solicitor 4)*

A recurring theme was that once a care order has been made, most of the practitioners do not know what happens. A judge observed that: 'by and large the issue of contact post care order is left to the discretion of the local authority' (Judge 4) and a guardian noted that she:

*...wouldn't necessarily get involved in that because it would be post care proceedings, it would be a child that's got an IRO and that has gone to an advocate. (Guardian 2)*

Three solicitors reflected on their final meetings prior to the end of proceedings as a moment where advice about possible future applications for a contact order might be offered, but currently were not.

*I wouldn't advise them unless they came to me and said it's a problem. Like I wouldn't put the idea in their head as we sort of waved goodbye at the end of care proceedings. (Solicitor 7)*

Another emphasised once again the reliance on the care plan:

*If I'm 100% honest I can't remember having a conversation about that which potentially is my failing, but what I would have done is made sure that my client had all her...you know, had the final care plan, final orders and I'm sure I would have said how contact was supposed to happen but I'm not sure I would have said – I'm being honest here and it's something I can learn from now – I'm not sure I would have said, 'Oh and if it doesn't happen, you know...(Solicitor 10)*

Similarly another suggested that: 'It would be good if you could have almost like a checklist before you close your case for a children's panel solicitor to go through with a child, you know' (Solicitor 4).

These observations and recommendations are important as practitioners, who did not think the absence of orders meant that the system was working, all emphasised that they thought young people were simply not aware of the possibility of making an application. One barrister thought that: 'if you're a child in care, I'm not sure...I just don't think you're aware that you can ask for that' (Barrister 1). A judge commented that, 'I don't believe children are given that advice' (Judge 3). Linked to this perception was a real frustration at the fact that children were not having contact with their siblings when, 'there are things that we can do' (Barrister 5). It is important to emphasise that these views are at odds with those that suggested that orders are not used because contact is taking place. But there was wide agreement about the need for more access to advocacy services. A number of independent providers of services were praised, such as the National Youth Advisory Service (NYAS) and the Family Rights

Group (FRG), a social worker referred to 'a complaints leaflet' (Social Work North Focus Group), and there was also reference to the use of technology, developed by young people themselves:

*Apps. There's a lot of talk about apps to try and help people know what they can and can't do. (Barrister 5)*

Our own review of information easily available to children in care over the internet revealed a mixed picture; very few sites provide specific advice about court orders<sup>36</sup> and some of the more accessible sites, interestingly, but potentially confusingly related to the US. Reliance on the voluntary organisations and other existing resources was perceived as inadequate and a social worker acknowledged that: 'it's one of those things that you are told and we're not reinforcing it enough maybe' (Social Worker South Focus Group).

The care plan review process discussed in Part 5.3 above is critical here, and most of the practitioners were clear in their view that it was the responsibility of the IROs to provide advice about applying to court to maintain contact. This aspect of the IRO's role is clear from the government guidance:

Children should be told by their IRO how they can access advocacy services if they have a complaint. The responsible authority should discuss with their local Children in Care Council their policy and procedures on sibling contact and regularly review their performance on the issue with both the Children in Care Council and other children in care. They should also consider producing guides for both children and young people about their rights and entitlements to sibling contact with their 45 Children in Care Council and holding an annual survey of children's views on this issue. (DfE, 2015: paras 2.90, 2.91)

Despite the clarity about this responsibility, there were mixed views about the IRO's effectiveness, as discussed above. One social worker commented that, 'I do think some of the IROs when you go to LAC reviews are really good at pushing this' (Social Worker South Focus Group), whereas a solicitor remarked:

*...as far as I know not a single care case has been referred back to court through the IRO to Cafcass and then back to court for whatever reason so it seems to me we can't discount the possibility that there are children out there who would want to push for contact and don't have the wherewithal or the means to achieve it through the courts because, you know, I would question whether the IRO mechanism does actually work in that way of referring things back to court. (Solicitor 2)*

It is important to note here that as this criticism of the IROs is based on cases *not* going to court it could overlook the extent to which IROs are able to resolve conflicts about contact without recourse to the courts and reflects the fact that, at the same time, legal practitioners consistently noted that they did not know what happened post proceedings. That said, the IROs in both focus groups were clear that going to court was a matter of last resort and one spoke of it as something possible 'in theory':

*There's no reason why they can't...Because I've got one girl at the moment, she's desperate for contact with her siblings living with dad. Dad has refused point blank for her, that's one of the things I've been talking to her about, whether she can apply for an order. Not done it but it's that in theory as a guardian we have our own legal advice and through the advocacy service she should be able to make an application to have contact with her siblings...my understanding is in law you're able to do that. I don't think it's done very often because usually you can work with families. (IRO South Focus Group)*

And other IROs identified that there was a distinction between their role and that of the advocacy service:

*IRO1: I think we're weakened by the fact that it's in different...*

*IRO2: And they have separate access to legal advisors which we don't know about so if they feel that they want to support the child to go down that route. (IRO South Focus Group)*

It was suggested by some that the absence of independent legal advice and support meant that in practice children were often dependent on advice from the authority or their carer. As judges in the focus group noted:

*J1: I think it's usually if they're with proactive foster carers or they've got a good social worker...*

*J2: Who'll support them and tell them how to go about it.*

*J3: And then very often they go back to the solicitor who acted for them within proceedings.*

*J4: But I would have thought an elder child making an application under Section 34 is mainly being encouraged either by their social worker or by their foster carers possibly. (Judges Focus Group)*

<sup>36</sup> The information available from Child Law Advice stands out for its clarity on this issue: <https://childlawadvice.org.uk/>

One consequence of this was concern about the advice available to children no longer in care. As a solicitor made clear:

*If they're in care themselves it should be coming up as part of their looked after child reviews. If they've left the care system, it would depend on the child. (Solicitor 7)*

But as another solicitor noted: 'If the child's with granny / aunt / mum's best friend as a special guardian, it's a private law matter, who's going to pick it up?' (Solicitor 4). This was considered particularly important as they were the children who some considered might benefit most from a court order. As a judge noted:

*If you've got one child in care and one child with family then you might very well make a contact order. If the children are all in care then it shouldn't be necessary... the care plan should be sufficiently specific and that the order is given to the IRO and so on so that it should be policed. (Judge 1)*

The potential lack of advice for these young people was also compounded at times by a confusion amongst non-legal practitioners about whether Section 34 or Section 8 was appropriate. An IRO commented that:

*I just wanted to get it before the courts so that the children could see each other and I didn't have the knowledge so I just said, 'Oh specific steps. Go and get the legal advice. It'll sort itself out!' (IRO South Focus Group)*

A guardian summarised these concerns:

*Actually a child that remains in care would probably be better off because they would have professionals like an IRO and a social worker to speak to...if a child was in a kinship placement...or remained with a parent and not seeing siblings, that's where it would be difficult because they wouldn't have any professional working with them... And if it was their carer that was reluctant to facilitate them seeing their siblings then they certainly wouldn't be advocating helping that young person. (Guardian 4)*

A barrister provided an example of this last scenario and it provides an important reminder that the same concerns about undermining of placements raised in adoption cases also occur in special guardianship cases:

*I represented a young lady who applied for a contact order to her siblings. Unfortunately she didn't get it... She was now living independently. She had left the care system...She felt that the special guardians had not been protective enough of her and weren't going to be able to protect her siblings...their willingness to facilitate it became a real hurdle. They didn't want her anywhere near, essentially because they were arguing that she would disrupt the placement, she would influence them. It was awful. (Barrister 5)*

There was evidence of judicial awareness of their reliance on applications being made and how siblings not subject to proceedings can be overlooked. As one judge observed:

*...if those other children aren't before me, I have no jurisdiction in respect of them, so it's reminding yourself where your jurisdiction is and you might say, 'wouldn't it be nice for these children to get together', but if one side says absolutely not then you're just limited to where your jurisdiction lies. (Judge 3)*

## Application for leave prior to the making of an application

*I think it's more about children having the information and the wherewithal to see someone to advise, be it an advocate, a lawyer, whoever... I'm not sure that leave ought to trouble them too much. (Solicitor 2)*

None of the interviewees spontaneously raised the question of the leave requirements under Sections 34 and 8. As noted above in Part 1, proposals have been made to remove the requirement for siblings. When raised with the practitioners, most considered the lack of access to advice for young people as more of a barrier to bringing applications and that leave would almost always be granted. The comment below from a barrister was typical:

*I don't think that the leave requirement is what prevents those applications being made because the reality is if you're a sibling, say, and you really want to see your 14 year old sibling who's in a different foster care placement and it's just not happening, if you were to apply, the court would undoubtedly think that there was merit in it being considered so...I think probably if you're a child who wants to seek contact with another child or parent, I don't think that necessarily the niceties of technical legal arguments about leave are what stop you. I think it's just something very practical... you don't know you can and even if you want to, you're not given the tools to make it easy for you. (Barrister 1)*

A guardian considered that the willingness to grant leave had changed:

*I think the court is more likely to give leave now than it perhaps would have done because, again, there's a lot more...because of the awareness of the importance of sibling relationships. (Guardian 3)*

But one solicitor noted a concern that, 'There aren't many cases so it's going to be difficult to get leave' (Solicitor 6). As noted above in Part 5.2 a magistrate raised the issue of allocation of proceedings:

*I've never had that. I know the procedure exists. My guess is that an application of that kind would probably go before a higher level actually. (Judge 5)*

That such an application for contact, unlike a decision to separate siblings, is deemed potentially too complex for magistrates, emphasises the extent to which there is a perceived exceptionality to such an application.

Support for keeping the leave requirement was expressed by practitioners across all the professions because of concerns, based on experience, that applications for sibling contact by a child were utilised by birth parents as 'a backdoor method to getting the case back into court' (Guardian 3) or, as a judge considered in a case she had observed, 'they'd been put up to it...they're the Trojan horse of the parent' (Judge 3).

Consequently as one solicitor noted: 'the courts need to be clear that this is actually the sibling and not being manipulated by the parents' (Solicitor 3). One judge cautiously noted that:

*I don't want to say anything that makes it sound as if there is a norm but...sometimes the older child is a pawn in the hand of one of the parents so the elder child's application can be an application by a parent using the child for that purpose. (Judge 4)*

A guardian suggested that parental support for sibling contact might be an option of last resort: 'because parents might well say, "Even if I don't have contact, I want the children to have contact"'. She also suggested that costs may be a factor as 'these days... parents can be at a great disadvantage whereas a child would probably get legal aid' (Guardian 3).

Only one practitioner supported the leave requirement on the basis of the child's status, suggesting that: 'it's right that parents are in a different position to everybody else'. But he qualified this by suggesting that it was not and should not be a significant barrier, implicitly questioned the concerns about parental influence, and compared the situation with policy debates about grandparents:

*I think it's probably not such a big hurdle...It's a bit like...in the family justice review there's a debate about removing it for grandparents and I think the answer they came up with, which I thought was the right one, is 'well we just won't make them pay the court fee' but I think there needs to be a hurdlette to get over... But I think for a child, just I can't see it would make any difference in practice...If you removed the bar, judges have robust case management powers anyway, so if they thought it was a crazy application they could always nip it in the bud then. (Solicitor 7)*

What is clear here is that even where there may be a rationalisation for the leave requirement it is coupled by the view that it should not be a barrier to applications.

## Orders to prevent contact

*Obviously we use 34(4) to stop contact regularly but not to produce...not to encourage it. (Judges Focus Group)*

While sibling contact orders under Section 34 are rare, concerns about siblings can sometimes be relevant to applications by authorities to refuse parental contact (CA 1989 s 34 (4)). The case law review revealed that parental contact is sometimes refused in order to facilitate inter-sibling contact<sup>37</sup> and, conversely, that sibling contact can sometimes be denied where it might *require* parental contact. In a case where the latter was argued the judge noted with approval the contribution of the children's guardian:

<sup>37</sup> *S v A Local Authority F, W, The Children by their Guardian Family Court At Rhyl (Sitting at the County Court at Mold) 2 April 2015 [2015] EWFC B90 (Fam); Coventry City Council v M and H (unreported) 23 May 2015 (see Bainham, 2015).*

...who looks at this case with a fresh pair of eyes, questions why Mother was not included in contact at an earlier stage and suggests that Mother's desire to be there to support her girls was understandable in circumstances where X had been removed into care without preparation. It is apparent that X has been asking to see his mother and his siblings for a significant period. A gap of 14 months in those circumstances is unacceptable. (*In the Matter of Child X*, MK14CO1562, 3 December 2014, WL 8663511, at para 37).

While most often made with regard to parents, refusal of contact orders can also apply to siblings and a few practitioners noted that they were used in:

*...very sad cases where a child is very, very damaged or has sexually abused a sibling, you know, circumstances like that where effectively children have to be protected from siblings.* (Barrister 2)

But a solicitor noted that while refusal of sibling contact was necessary 'if there's intra sibling sexual abuse and stuff like that', the issue could be dealt with in the care plan:

*I can't think of a situation where that's ever had to be ordered because...no one's been arguing that this child should be having more contact with their siblings, there's never been a reason for the court to make an order about it.* (Solicitor 9)

Concerns have been raised that failure to apply for refusal of contact orders where 'reasonable contact' with parents has not been arranged, places the burden, wrongly, on parents to make applications for contact (Bainham, 2015). Clarity here is important and indicates that calls for extending the presumption of contact to siblings, if introduced, would need to be backed up by clarity about what reasonable contact means and awareness and an ability for siblings to challenge non-compliance. As a guardian acknowledged:

*You see local authorities can kind of...You know, if you don't facilitate it, it doesn't happen, does it? So you can kind of like fairly effectively put the kibosh on it without needing an order.* (Guardian 4)



## 6: ADOPTION

### 6.1 Introduction

A key finding from the research is that across all the professions there was an acknowledgment and assumption that adoption not only results in the *legal* severance of a prior sibling relationship but also substantially increases the likelihood of severance of the relationship in reality.

*When some of the siblings are adopted and some of them not...that relationship completely changes. So they lose that sort of sibling relationship. (Social Worker North Focus Group)*

*The starting point is if you're placing a child for adoption, it is unusual for it to be an open adoption and direct contact with a sibling. (Judge 4)*

*There was a fashion of open adoptions and there was a big push for whether they were a better idea and that all seemed to fizzle out. (Solicitor 7)*

One of our young advisers shared this impression:

*...adopted is like where you get like a new family and they'll count you as literally like their daughter and you'd call them like mum and dad and you'd get like new cousins and stuff. And you wouldn't really have contact with like your birth family anymore if you got adopted. But then fostered is where you kind of like still have contact with your birth family. (YPPG1)*

These views were also clear from the case review, where the reality of the loss of sibling relationships, sometimes explicitly and sometimes in the context of birth relatives generally, is routinely referred to in evaluating the consequences of adoption against alternative outcomes. Recent examples of typical statements in cases are:

The disadvantages of adoption are that their relationship with their birth families would be severed both legally and practically. (*SCST v D & W* (2018) WL 00691623, HHL Owens)

Adoption carries with it the disadvantage arising from the loss of the birth family, with the parental and sibling relationships. (*Lancashire County Council v A (Adoption)* 2017 WL 03726360 HHJ Duggan, at para 32)

If the child in question has siblings the child often loses touch with his/her siblings, and the chance to grow up with someone who shares the same gene pool and background. Again, it is a loss to both sides. (*Birmingham City Council v M, MI, DH, E, A, L (Children acting by their Guardian)* 2014 WL 5113491. Hogg J, at para 34)

Despite the matter of fact and routine acknowledgment of the consequences, the findings suggest that practitioners are often keenly aware of the importance and benefits of sibling relationships. There was also evidence of heightened sensitivity to the injustice whereby siblings lose an existing or potential relationship through no fault of their own. This is particularly clear from judgments in the case review and the interviews where judges refer to decisions where siblings will be separated by adoption as 'the hardest'<sup>38</sup>, 'the most difficult'<sup>39</sup>, 'heartbreaking' (Judge 1); as one judge noted, 'I really hate that...it's very hard to deal with' (Judge 2). A key finding consequently is that awareness of the impact of adoption on siblings is not in doubt. At the same time these expressions of concern, reinforce albeit unintentionally, the conventional view of adoption as 'closed' and the stark binary approach to contact in care and adoption proceedings. Moreover a key finding was that the assumptions about the importance of the sibling relationship are routinely outweighed by other factors and competing assumptions.

Many of these assumptions and factors go to the heart of current debates about the meaning of adoption more widely. The current government guidance states clearly that while the underlying philosophy of care proceedings under the Children Act 1989 is the reunification of the family, 'the adoptive placement is fundamentally different as the intention is that a child should become part of another family' (DoE, 2013: para 7.1). But alongside this is a

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<sup>38</sup> *In the Matter of R (Children)* [2013] EWCA Civ 1018 at para 15.

<sup>39</sup> *Re A (Children)* [2013] EWCA Civ 1611.

recognition of the potential benefits of sustaining contact and in the context of siblings in particular the advice is that 'it is important to ensure that contact arrangements between them are given very careful attention and plans for maintaining contact are robust' (DoE, 2013: para 7.11). While questions in these debates are most vocally raised in the context of birth parents, they are further complicated in cases involving siblings where the 'best interests' of one points to adoption, but not for the other; and where one child lives with or remains in contact with the birth parents.

In this chapter we examine how practitioners address these challenges and in particular how practitioners negotiate, navigate and attempt to ameliorate the tensions between the competing assumptions.

## 6.2 Placement for adoption

We start by examining the extent to which concerns about separating siblings inform decisions to place a child for adoption, in particular the impact here of recent judicial concerns about adoption, the weight placed on and the analysis of the impact of the loss of a relationship, and attempts to enable siblings to be adopted together through time-limited searches.

### The Impact of *Re B-S*

The decision to place a child for adoption is an extreme step which requires the highest level of evidence. Judicial concern about the quality of decision making here is not new but came to the fore most recently in the high profile judgment of the Court of Appeal in *Re B-S* [2013] EWCA Civ 1146. This case, together with the Supreme Court judgment in *Re B* [2013] UKSC, has attracted much discussion and debate (Masson, 2018; NALB, 2014). Widely understood to have been informed by a concern to ensure respect for the rights of birth parents, its impact on decision making about cases involving siblings was a key question for this research. It also provides a starting point for considering the weight placed on sibling relationships as a factor in placement for adoption proceedings.

A recurring response in our findings, from across the professions, but most notably the judges, was that the case 'doesn't have anything to say about siblings' (Judge 1) and was not considered to have any relevance to siblings. This was further emphasised by the fact that the case was very rarely mentioned spontaneously in the interviews and focus groups:

*I think it's fair to say the Re B-S analysis still focussed on the parents and not siblings. It's about justifying the adoption from the birth parents' perspective as opposed to a real analysis of the siblings. (Judges Focus Group)*

*I can't really think of a Re B-S tabular analysis which really grapples with the sibling issues. (Judges Focus Group)*

However it was acknowledged that where, or if, there had been a reduction in placement orders as a result of the judgment, this might have, indirectly, resulted in some siblings remaining more closely connected:

*I don't think there's any correlation between saying well actually we won't go for adoption because we've got four siblings and the focus is going to be on keeping them together...I think what people will say is well actually is there any other option for this child? If there is another option – particularly SGO – then we will go with that and indirectly that will then impact on contact because there's more chance that they'll have contact if you do. (Solicitor 3)*

*Yes, as a matter of logic if children are not being taken off and placed in different families for adoption, it should be easier to promote the sibling relationship. (Judge 1)*

*There's likely to be more, yeah,...they're split but with an ongoing relationship, not a severance of a relationship. (Judge 3)*

*If you have less children that are adopted...that sort of veil doesn't come down. (Solicitor 6)*

However, the potentially re-energised focus on birth relative alternatives to adoption, through special guardianship proceedings or otherwise, can also have the opposite effect and sometimes results in siblings being separated. This is the situation where a sibling of a previously adopted child enters the care system, often at birth, and the

adopters are willing to adopt the second child, but where birth relatives of that child, who may or may not be related to the adopted child, also wish to care for the new baby.

One practitioner was critical of what she perceived to be the impact of *Re B-S* in such a situation:

*The child had a placement with a sibling for adoption, permanent option already there, that could have happened much, much earlier had the judge actually considered the attachment for the child but he was so focused on this child being placed with extended family at any cost. (IRO North Focus Group )*

The problem for judges faced with these situations are legal authorities that have made clear that care and placement proceedings should not be a competition between birth relatives and known adopters but about the appropriateness of adoption per se. However in a recent case the Court of Appeal upheld a decision which had been criticised for emphasising the sibling relationship over the ‘nothing else will do’ criteria for adoption, as Munby P held:

*How else was the judge to proceed? She was confronted with the fact – the reality – that B’s only full sibling, H, a sibling close to her in age, had been adopted and that H’s adoptive parents were filing to adopt...B’s future relationship with H throughout their lives tipped the balance and was determinative of the outcome. (Re B (A Child) [2018] EWCA Civ 20, paras 24 and 28)*

The case law review supported the finding that *Re B-S* is rarely perceived as being *explicitly* about or referred to in the context of siblings. But there are a few exceptions. For example, in one case a judge adjourned proceedings on the basis that:

*What has exercised my consideration is whether the adoptive placement in this case does properly satisfy the Re B and Re B-S test, bearing in mind the level of ongoing inter-sibling contact proposed by the Children’s Guardian. (X County Council v AJBM, ADBM, LBM, JBM, KBM, EBM (the children) by their Guardian 2016 WL 00826273, para 104, HHJ Jones)*

But it is important to emphasise that the absence of such explicit references does not mean that it has had no effect. Practitioners sometimes distinguished the minimal impact of *the debate* about *Re B-S* on discussions about siblings, from the general impact on the process of evaluation followed by local authorities and the manner in which they present their cases to the court. As a social worker observed:

*I don’t think that impacts specifically...on care planning for siblings, I think it’s just something that impacts our practice and the way we produce our work now. (Social Worker North Focus Group)*

A general concern was that it tended to lead to a formulaic approach:

*It’s become a bit of a tick box exercise as opposed to...Well they just have a little chart, you know; tick, tick. (Solicitor 1)*

*I mean because it’s in a table then there is lip service to a holistic approach but really they still work through it; you know, let’s see who we can knock out of the equation and oh gosh, we’re left with this, that’ll be our recommendation. (Judges Focus Group)*

Some however did consider that it had had a positive effect:

*Because of Re B-S, I think it’s much more common to really apply rigour...and rather than just social workers say, ‘Well, the younger two need to be adopted’... I think they do have to apply a little more analysis to the nature of those relationships. (Barrister 1)*

*It’s almost the formulaicness of it, forces at some stage the thought process to have happened. (Solicitor 7)*

Similarly social workers suggested that, ‘to make it BS compliant essentially, you know...less information and more analysis’ and that ‘your in-house lawyer’s saying this to you’ and that with regard to contact, ‘you need to evidence why there isn’t any’ (Social Worker North Focus Group).

## **‘The likely effect on the child (throughout his life) of having ceased to be a member of the original family’**

The relevance of this key provision requiring analysis was identified by a solicitor:

*You know, when you’ve looked at the options and you’ve come to the view that adoption is the only option for this child, you have already analysed them no longer being a member of that birth family, losing their siblings, you know, and all throughout their life so you would have analysed it at the care plan stage and then you’re going on to make the placement order but in accordance with the proper BS analysis. So I think a BS analysis is always in Section 1(4). (Solicitor 4)*

Case law provides examples of where a failure to demonstrate such an analysis is the basis of a decision to delay proceedings. For example in one case the judge held that:

*The LA has done little to assess the likely impact of separation upon K and has given even less thought to the support she is likely to need to get through what I am confident would be a very difficult and distressing experience for her. (Re K,D (Children: Care Proceedings: Separation of Siblings) [2014] WL 4081297, Bellamy HHJ, para 166, see also Re A, B, C, D and E (Children: Care Plans) [2017] EWFC B56)*

Such cases appear to be unusual and concerns about the impact of delay on the children, as much as compliance with the 26 weeks target for proceedings, can weigh against them. Moreover, in the interviews, practitioners observed that in the context of the analysis of loss of relationships:

*I see far more references to parents than I do to siblings whereas I think actually siblings being a more enduring relationship are extraordinarily important. (Judge 1)*

*I don’t see a detailed analysis of the effect of losing contact or restricting contact and the emotional harm that’s going to occur to the child,...In case after case it feels almost like a cut and paste job that there’s some formula if you’re not together. (Solicitor 6)*

The solicitor above made clear however that with the support of guardians this absence in care plans was increasingly the basis of challenges in court.

## **Long term fostering v adoption**

Where the loss of the relationship with a sibling is considered it is routinely outweighed by deeply held assumptions about the advantages of adoption.

*...it’s almost a cliché...because it is quite powerful, you know the security and stability of adoption is evidentially supposed to be a much...well give a chance of a much more successful outcome than continued foster care. (Barrister 4)*

In one case, a judge dismissed in strong terms the views of a child psychologist who recommended long term fostering on the basis of the importance of the inter-sibling relationship, revealing the strength of the assumption that adoption is a more ‘permanent’ option:

*I asked Dr Blows whether or not I was right to believe that the children’s overriding and urgent need is to be found a permanent alternative family; and that, as all involved with the family justice would have to recognise, there is only one route towards securing that ambition which is adoption. He did not agree, saying that long term fostering could provide permanence as well – a bewildering answer to say the least. (Re CtL and CmL (Children)(Welfare Hearing: Expert Report) [2013] EWHC 2134 (Fam) Pauffley, J at para 26 (emphasis added)*

A case where the Court of Appeal upheld a placement order indicates the requirement of evidence of a serious consideration of Section 1(4)(f); but, similarly, how despite the acknowledgment of the likelihood of no post-adoption contact, it is outweighed by other factors:

*The judge specifically described the possibility of the severance of contact between the children and A [older sibling] as being ‘the hardest one’ for her. She said that ‘a shared childhood is undoubtedly an important ingredient in forming any person’s self image and identity’. She balanced that against the risk of the disclosure of the children’s whereabouts to the wider family and the detrimental conflicts that could*

be engendered. She described how the benefits to the younger children of having a permanent family of their own outweighed their birth family connections. (*In the Matter of R (Children)* [2013] EWCA Civ 1018, Macfarlane LJ at para 15)

A more recent case where a placement order was made by a Recorder provides insight into the thinking amongst some of the judiciary in the lower courts:

The local authority's view is based on the fact that there should be certainty and permanency at the earliest possible stage, whereas the guardian's view is that sibling contact overrides the need for certainty and permanency. It may be that in ten years' time the question will be answered differently. It is clear that even over the last few years far more weight is given to sibling contact than it was a not very long time ago. But *it seems to me the weight of judicial thinking, as at the moment, is that permanency and certainty outweigh the need for sibling contact*, but it does seem to me that sibling contact is particularly important. (para 54, *In the Matter of W-C (Children)* [2017] EWCA 250 at para 20, emphasis added)

The decision by the Recorder was appealed by the guardian and overruled; Macfarlane LJ holding that it was 'a wholly inadequate judgment in terms of its analysis of the issue as between long-term fostering and adoption for D' (ibid para 21) and that a 'central fault' in the judgment was 'characterising the case as one of 'permanency vs sibling contact' (ibid para 26). The case demonstrates again how critical the role of the guardian is in challenging assumptions. At the same time, while describing the guardian in this case as 'experienced', and placing some weight on this, Macfarlane LJ also describes the guardian's recommendation of long-term fostering for a two-year old child as 'somewhat atypical'.

## The significance of age

As noted above age emerged as the most significant driver of sibling decision making in adoption proceedings. As a judge explained:

*...age comes in because there's a cut off when kids are not adoptable...So sometimes there's good reason to separate them. It may be that their relationship is just completely fractured. It may be that one of the children has a disability that means that they're violent or aggressive or they've got some behavioural traits that are such that actually they're dangerous to the other sibling or they're holding the other sibling back. And so you can justify it very simply. But I think the real problem is when actually it's none of the above and there is no good reason to separate these siblings or no real...no reason that is between them. You're separating them because the younger two have...or the younger one has a better life expectancy being separated than being together. (Judge 3)*

As noted above this is legitimised by the construction of the younger child, their defining characteristic as being their adoptability and their need for permanence. In this regard, the younger child is placed on a sliding scale of problematisation, with newborns deemed simple to place and relatively untainted by experience. Age as an absolute, if transient, characteristic of the child is highly significant in infancy, when the period 0-2 or 0-3 is understood in very different ways to ages beyond this. The young baby or child is talked of as a candidate for adoption for three reasons:

- they are desirable to prospective adopters;
- they are positioned on a sliding scale of 'damage' caused by inadequate birth parenting which is understood to worsen through increased exposure over time, and;
- they have not yet forged 'actual' relationships with birth siblings.

At the same time it is important to note that the perceived upper limit of adoptability varied greatly in our interviews from 1 to 7 years.

A strong bifurcation in the conceptualisation of older and younger children allows for the younger child's interests to be explicitly separated from, and prioritised over, the continued existence of the sibling group or the needs of the older child for a normal relationship with his or her siblings based on co-residence or extensive contact. The theme of 'sacrifice' was articulated explicitly and implicitly.

Many interviewees, across professions, expressed discomfort with age-driven decision making in particular where it gave insufficient consideration to both the specific needs of a sibling group and individuals within that group and the needs of older siblings.

The interviews and focus groups confirmed the extent to which adoption is the preferred – indeed at times assumed – option for babies and younger children; that while the method of analysis of the Recorder above could be challenged, the assumptions about the benefits of adoption are hard to rebut. As one judge commented:

*Exposing a tiny baby to the vagaries of foster care is going to be a killer point in terms of the preferential balance between the other child's relationship. (Judge 1)*

That this was practitioners' perception of the judicial thinking was confirmed by a solicitor:

*...the courts generally seem to share the view that unless there's something really exceptional in the case, you know, weighing up the advantages of maintaining the sibling relationship between an older child and a young like a baby versus the disadvantages to the baby of a placement in foster care for X number of years will invariably come down on the side of adoption. (Solicitor 9)*

Similarly another solicitor observed that:

*They seem to have the arbitrary cut-off in respect to adoption so if the child's five or under they still believe there's a chance for an adoptive placement so they wouldn't necessarily let the fact that they could all be kept together stand in the way of that child having a forever home as they call it. (Solicitor 8)*

The extent to which this is a dominant assumption was confirmed by a judge:

*I think if you're talking about a baby, if I made that decision honestly I'd be appealed and I'd be overturned... And I know that. I think the law would be against me. To put a child into long term fostering for its minority when that child could have the security and stability, and it's a mantra of a forever family, I think would just be completely... You would have to have exceptional circumstances in my view. (Judge 4)*

## Policy and personal considerations

A key finding, which emerged from all the professions, was that the assumptions about the benefits of adoption are not based simply on an analysis of a child's 'best interests', but are also informed by questions of policy, which some expressed concerns about.

*Well it's easy to point out the negatives of fostering, isn't it?... And it is from the judicial perspective, we're encouraged to believe that it is quite unstable compared with adoption. I'm not sure it necessarily is. (Judge 4)*

*It is political, isn't it... there is a negative slant towards long term fostering. (Social Worker North Focus Group)*

*There is no doubt in my mind that the prevailing ethos in most local authorities if not all is that adoption is superior as a way of offering security and stability for fostering... there's a great deal of resentment to Re B-S in local authorities... resentment to that greater analysis under Section 1(4) and it's very much adoption at all costs at times particularly for younger children... I wouldn't even hesitate in saying that... that's what I see in care plans that I often litigate. (Solicitor 6)*

That questions of policy were a factor in decision making emerged in the interviews when practitioners emphasised the significance of the views of individual judges. As one acknowledged:

*You've come across somebody who doesn't really like non consensual adoption.... I mean I'm certainly aware of other people who would be much more at ease with the idea of adoption and think it a very good thing and talk about belonging and the child being claimed by adoptive parents in a way that no other placement does claim them, other than obviously a family placement. (Judge 2)*

One barrister similarly noted while most judges 'will err on the side of stability', some might be inclined to attach more weight to arguments about the loss of a sibling relationship:



*...it depends on your judge...If they're opposed to adoption...it's another avenue they can use to...Not justify but legitimise opposing a plan for a placement order because they will say,...'I think sibling contact is so important that I'm not prepared to...' My feeling is it's coming from them...that there is a personal motivator for that...Not that they've got an agenda necessarily but that they're far more open to the importance of it and willing to stand by the importance of it, perhaps sort of driven by the fact they're not overly keen on adoption. (Barrister 5)*

Another barrister noted that:

*I mean in some ways it's relatively straightforward because if you're trying to argue against the adoption, you emphasise what the research says about the lifelong connection and importance and there is some research, isn't there, I seem to remember, I couldn't quote it off hand, about the potential harm that can be done by severing, that separation, and about how actually that can in some circumstances lead to undermining and failure of placements and stuff like that. (Barrister 4)*

One solicitor commented that arguments about siblings could have an additional weight to them, in contrast to an argument made by birth parents, because:

*It is a positive argument to put because most of the arguments, particularly when you go for parents, are negative arguments, you know, saying the social worker lies or, you know, this didn't happen or, you know, rather than a positive argument for saying I'm saying do this because I feel this is the best interest in the child...they're the better arguments to make rather than sniping about facts. (Solicitor 8)*

That arguments about siblings may have a strategic value can give rise to concerns that they are 'utilised' by parents, as noted above in the context of applications by children for contact. Who makes the argument consequently can also make a difference and where they are made by guardians they may have more weight than if made by birth parents' lawyers.

## Whose best interests?

Where an adoption is considered to be in the best interests of a child, a key critical question is the extent to which the effect of that adoption on his or her siblings should be taken into account. The judges acknowledged the difficulties here:

*I sometimes worry that the interest of the older children are not as thoroughly looked at as the interests of the younger ones. And of course it's very difficult for guardians because they're trying to balance the interests of all of them. (Judges Focus Group)*

*You know, making a decision that nothing else but adoption will do for one child but not for another, not for a sibling, is a difficult call to make sometimes. (Judge 4)*

The nature of the dilemma confronting courts was expressed in one case in stark terms:

*Should D be placed for adoption if to do so would cause emotional harm to his sister? (Re K,D (Children: Care Proceedings: Separation of Siblings) [2014] WL 4081297, Bellamy HHJ, at para 175)*

Our findings make clear that assumptions about the benefits of adoption for younger children routinely outweigh the impact on an older sibling. At the same time our findings suggest that there is a lack of clarity about the analysis required when considering decisions that affect a sibling group.

Often it is the impact of the effect of the adoption on the younger child that is the focus of the analysis. This is generally the case even when arguments are made to keep siblings together. As one solicitor noted:

*If they have an older sibling that they're particularly close to then we have had cases where your sibling assessment would say ordinarily adoption may be considered for a child of so-and-so's age, however, their relationship with big brother / big sister is so important to them and there is this placement for them together that we wouldn't consider it appropriate to sever the sibling relationship in that situation. (Solicitor 9, emphasis added)*

When the emphasis is on the younger child, a distinction frequently made is between a 'potential relationship' and an 'actual relationship'. The guidance encourages this by advising that whether siblings 'know each other' is a

relevant factor (DoE, 2013, para 3.16). Where adoption is proposed for a baby or young child, consequently, this distinction reinforces the assumptions about adoption as the preferred option. As two solicitors noted:

*Sibling number three was a baby so, you know, strictly speaking, you know, had no needs etc. (Solicitor 4)*

*It would just be more of the future, you know, in terms of depriving them of that potential relationship but that wouldn't be the strongest argument. (Solicitor 8)*

The same assumption is particularly clear from a case where a judge held that:

*RA has never experienced any family life with his birth family – so the 'likely effect on [him] (throughout his life) of having ceased to be a member of the original family and become an adopted person'...is divested of any real meaning. (In the matter of RA (Baby Relinquished for Adoption) [2016] EWFC 47, at para 65, emphasis added)*

Similarly in another case it was held that:

*The plan would be for him to be placed away from his sisters, and of course they would be very upset to lose him. However, he is not yet twelve months old. I accept the proposition that the sibling relationship is less important for him than it is for the older siblings. (Lancashire County Council v A (Adoption) 2017 WL 03726360 HHJ Duggan, at para 29)*

One of the young advisers described what she thought the implications of this would be for the older sibling:

*...at the end of the day the older sibling knows that the younger sibling is still there so the older sibling, even though they don't know where the younger sibling is, they always...and they knew then and they will always know that that sibling is there somewhere, even though the little one wouldn't remember her depending on the age. (YPPG2)*

But another young adviser suggested that if the older child was 'unaware it's even born...it wouldn't affect them' (YPPG1). As noted above this hints at the complex function of 'indirect contact': whether it is primarily for the future or to provide an ongoing connection throughout childhood.

A key factor in determining the extent to which the older child's interests can be taken into account is whether or not the older child is also a subject in the proceedings:

*It tends to be considered far more thoroughly in cases where all the siblings are going through care proceedings together. Where sibling follows sibling in separate proceedings it's rather more lost and that's where I think is the more complex area. (Solicitor 1)*

One solicitor suggested or 'guessed' what he thought the approach should be where adoption was the 'only realistic option' for a baby:

*...you've got to look in parallel with how does that work for the other siblings... you've got to look at what that's going to mean for the sibship as a whole...I guess it's got to be a particular focus on individual children and then stepping back and thinking well how does that all fit together because different children have different needs and you can't ignore that. (Solicitor 2)*

In a recent case the focus on 'sibship as a whole' was critical in a successful appeal against a placement order where the guardian had recommended that keeping three siblings together outweighed the possibility and benefits of adoption for the youngest. The case reaffirms, once again, the significant impact that guardians have both in challenging placement plans and in judicial thinking. Macfarlane LJ held in this case that:

*It was necessary for the judge to engage with the thought process that the guardian had undertaken in deciding whether there should be a priority given to the need to keep all three of these children together as one group even if that meant sacrificing the possibility of an adoptive placement for any of them. (In the Matter of H (Children) [2016] EWCA Civ 1131, at para 83)*

In another case, where proceedings were adjourned for the inter-sibling relationship to be further considered, the judge made explicit reference to the legal basis for considering the effect of the proposed adoption on the other non-subject siblings:

While ultimately it is the welfare interests of the subject children in the Placement Application which are paramount with regard to those applications, the Court can take into account the impact upon other non-subject siblings, because the 'welfare checklist' under section 1(4) Adoption and Children Act 2002, indicates that the Court must have regard to the specified matters 'among others', i.e. the listed considerations are not exhaustive. (*X County Council v AJBM, ADBM, LBM, JBM, KBM, EBM (the children) by their Guardian*) 2016 WL 00826273 HHJ Jones, at para 63)

Addressing the issue more recently, the Court of Appeal upheld an appeal against a decision to not make a placement order, which would have resulted in a 21 month old boy being separated from his two older half-sisters. Macfarlane LJ held that the trial judge had failed to 'separate the welfare issues for each child and balance them up' and that:

The judge put a premium on not splitting the children up, and no doubt that was and is an important matter in the welfare evaluation, but it has to be married up against the possible benefits of adoption looked at separately for each child. (*In the Matter of S-L (Children)* [2017] EWCA Civ 2333, at para 22)

On the rehearing of this case the placement order for the adoption of the boy was made and the judge gave the following explanation of the underlying law behind the balancing exercise:

Section 1(4)(f) of the Act importantly requires the court to consider the relationship which the child has with relatives (which includes sisters) and the wishes and feelings of any of the child's relatives (including, therefore, his sisters) regarding the child. However, the focus of section 1 is clearly upon the welfare of the subject child...and the court is not required to give *decisive* weight to the welfare of relatives, including even sisters who are themselves still children. This follows from the paramountcy of the welfare of the child concerned under section 1 (2)... the welfare of the sisters cannot trump the welfare of C. (*Kirklees Council v LS, TL*, [2018] EWFC 12, Holman J, at para 25, emphasis added)

It would appear that as long as the weight placed on the welfare on other siblings is not *decisive* it can be taken into account. As noted above, in practice much depends on the view of individual practitioners about the competing assumptions about the benefits of a sibling relationship and those of adoption for younger children.

## Article 8

One possibility we wanted to explore was whether human rights arguments were used to add weight to considering the interests of an older child faced with a proposed adoption of and separation from a sibling, in particular the potential use of Article 8 of the European Convention of Human Rights (the right to respect for private and family life).

The interviews with practitioners suggested that it had little impact and was rarely mentioned. A barrister explained that this was because it added little to the welfare tests: 'if you're applying Section 1 [the welfare test] the chances are that you've applied Article 8' (Barrister 3). Similarly, a judge noted that: 'I think if they start relying on Article 8 it is pretty desperate' (Judges Focus Group). However another judge was more supportive, noting that:

*I've certainly had that and I've dealt with a case recently...where a child who was not subject to proceedings was very forcefully representing that his Article 8 rights were interfered with...and quite right too.* (Judge 1)

One guardian was intrigued by its applicability to siblings:

*Parents will use Article 8...you always got magistrates saying, 'we've considered Article 8'... when they were removing children from their family, but I've never heard it in relation to siblings ever, but now you've told me...That's good, it's quite clever.* (Guardian 3)

Although the question was never raised by any of the practitioners, one possible reason for the lack of reference to Article 8 could be uncertainty as to the circumstances in which the right is engaged for an older sibling who is not subject to proceedings. Prior to an actual adoption order the existence of a legal relationship would assist them, but if a non-subject child has never lived with or indeed never met the younger sibling, which if it is a baby is not unlikely, it is still questionable. Where Article 8 rights are engaged, the implications of this are highlighted in

the case law. In one case a judge held that her decision had to be made in accordance with the welfare tests *and at the same time* meet:

*...the requirement of proportionality and fully respects the right to family life of L [the subject child], but also her siblings. (London Borough of X v KD, MP, WP, LP (by her Guardian [2016] WL 04261451, Harris HHJ (In Private) Central FC, at para 97, emphasis added)*

Similarly it was held in another case that:

*...decisions of the the Family Court should be proportionate in their outcomes for all siblings...the effects on all the siblings is something that should properly be kept in mind. (Re T (Children) [2014] EWCA Civ 1369, Russell J at para 59, emphasis added)*

These decisions strongly suggest that where an older sibling's Article 8 rights are engaged, there is an argument to be made that alongside the welfare tests there should be a separate human rights proportionality evaluation balancing the effects of a placement order on each sibling's rights in order to evaluate whether or not the decision is proportionate. This is not to suggest that the outcomes would or indeed should necessarily be different, but it would ensure that the interest of older children are not, as many of the interviewees noted, outweighed simply on the basis of assumptions about the benefits of adoption for the younger child.

## Adoption together: Time-limited searches

A key finding from both the case review and the interviews was the frequency of placement orders for adoption being made alongside care plans for time-limited searches for joint adoptive placements for siblings. They represent an attempt to balance the interests of older and younger siblings: a recognition of the potentially detrimental impact of separating siblings, particularly for older siblings, but at the same time of the positive benefits of adoption and the difficulties finding adopters willing or able to take on sibling groups. A social worker identified the pragmatism informing the use of time limited searches:

*Kids get separated so one can have the chance at adoption because often, you know, children over the age of eight are said to be hard to adopt so do you separate them to give one a chance of having an adoptive family or do you keep them together? I've seen them be kept together and it breaking down and then the younger child has lost out on their chance to be adopted. (Social Worker South Focus Group)*

Similarly a judge who favoured these plans, explained that separating siblings is:

*...a heartbreaking decision and...I would like them to just try. But I don't want too much delay. (Judge 1)*

But, crucially, she also added that, 'it's purely a matter for the local authority'. This is critical. A key finding was concern about the lack of oversight of the efforts made during the allocated search period; that despite a local authority committing to try to keep siblings together, it was, in effect a 'blank cheque', as one judge noted:

*Well at the end of the day if they need to be together, they need to be together and what it is, it's a backdoor way when you talk about these time limited searches, it's a backdoor way of splitting the little ones off. (Judges Focus Group)*

## Judicial powers

The interviews and the case review reveal judges at times expressing a degree of frustration at the limit to their powers. This was most acute in situations where a judge considers that adoption is acceptable, that 'nothing else will do', but only if siblings are kept together. The interviews revealed that this was sometimes reflected in a care plan committing to a time-limited for a joint adoption which, if unsuccessful, would then revert to a plan for long-term fostering. For example a solicitor noted that:

*I've had lots of cases where they'll say, 'We'll keep them together and we'll try and find them an adoptive placement and if we can't after six months then we'll find long term fostering for them, keeping sibling groups together. (Solicitor 5)*

One judge made clear that the court can play an active role in this:

*I had my contingent care plans which are a real favourite of saying that I make a placement order on the basis that they'll search for a placement for 12 months and then after the 12 months it'll revert to long term fostering and they'll apply to discharge the placement order...sometimes with older siblings that's the agreement I reach. (Judge 3)*

But the judge emphasised that, 'I've got no power to do that'. In other words while he referred to 'my contingent care plans', he acknowledged that his power is limited to suggesting or encouraging a local authority to agree to such a plan. If they choose not to the only option for a court is to decline to make the placement order and the Court of Appeal has confirmed in *Re A (Children)* [2013] EWCA Civ 1611 that the courts have no power to make conditional placement orders.

Another judge made clear that where a local authority was not willing to agree to a 'contingent' care plan a local authority could, justifiably in his view, cite *Re B-S* in response:

*Yeah. I mean the argument that local authorities can then run on the basis of Re B-S is that if you have decided that nothing else but adoption will do, how can you then approve long term foster care because you couldn't find an adoptive placement? Fair point. (Judge 4)*

In a recent case where a local authority agreed to a contingent care plan, the judge observed that he was 'profoundly concerned' about the fact that a local authority was entitled 'to change those plans if it considers that the children's welfare requires it' without 'the prior approval of the court'. He made clear that 'if I had the power to order that that could not happen...I would unhesitatingly make that order' (*Re A, B, C, D (Children: Placement Orders: Separating Siblings*, Bellamy HHJ, at paras 104,111).

In the event of the local authority changing its plans, the absence of such a power was, in the view of the judge, compounded by the difficulties facing parents attempting to challenge the placement orders or oppose a future adoption application (ibid, paras 107, 108). In such a situation the judge emphasised the importance of IROs undertaking an active role in reviews of the care plan and emphasised the importance of 'an effective handover from the Children's Guardian to the IRO' and that 'the courts concerns about a future change in plan to four separate placements are emphasised and understood' (ibid, para 113).

## Adoption orders: Summary

In an earlier case where the Court of Appeal overruled an adoption order where all parties agreed there would be an ongoing relationship with a birth father and siblings, Hale LJ noted that:

*I have to say as an aside that the ideal solution in this case might have been, were it possible, that an adoption order was made for the foster mother to replace J's mother while leaving the relationship between J and his father intact. (In the Matter of B (A Child) [2001] EWCA CIV 347, at para 27)*

The facts in this case were unusual, but it highlights precisely the problem in most cases involving separated siblings where only one is adopted: that it is not possible to transfer parenthood and sole parental responsibility to adopters, which may be appropriate, while at the same time keeping the sibling relationship intact. In our findings professionals made similar observations where siblings are separated by adoption. According to a guardian:

*So you don't even have that flexibility of being able to sort of come to get something that kind of would combine the best of both worlds. So you end up knowing what you really want and then go well we don't have to offer that to these children, instead we have to offer them what there is which would be adoption and no contact or together as foster placement. (Guardian 4)*

Similarly, in a case where a judge was faced with the same choice, he observed that:

*Family law judges are often required to make hard, binary choices between two tough outcomes, neither of which is ideal for the child, or children, concerned. (Kirklees Council v LS, TL, [2018] EWFC 12, Holman J, at para 1)*

Where there are concerns about the separation of siblings as a result of adoption, a key way in which practitioners attempt to ameliorate the potential harm is by attempting to ensure that contact is maintained. This is distinct from attempts to keep siblings together but raises similar questions about the relationship between the courts and local authorities.

## 6.3 Adoption and contact

### Introduction

A key finding from the interviews and focus groups is that there is evidence of widespread professional appreciation of the benefits of post-adoption contact, beyond indirect contact and 'life story' work. There was clear evidence of a shift in attitudes from the traditional view, expressed in an important House of Lords case from 1989, that 'in normal circumstances it is *desirable* that there should be a complete break'<sup>40</sup>. Evidence of this change is the emphasis placed by all professionals on the importance of finding adopters willing to facilitate contact and of training and support for adopters to enhance this. But at the same time our findings suggest that in practice the effect of these initiatives and expressions of support for contact are routinely outweighed by concerns about restricting the pool of adopters and the possibility of contact undermining an adoptive placement. Moreover, in addition to these pragmatic concerns there remains a deep seated support for the view that decisions about contact legitimately rest with adopters, that it is an aspect of their 'parental responsibility' and consequently that post adoption contact both is and should be subject to their agreement. The biggest challenge to the status quo was not law but the impact of social media.

The findings also confirmed and helped to explain the reasons for an extreme reluctance to countenance the use of court orders to facilitate contact, whether by Section 26 alongside an initial placement order or by Section 51A or Section 8 after an adoption order. A key finding is that this reluctance informs other alternative initiatives such as recitals in placement orders and time-limited searches.

### Assumptions about adoption and contact

A key finding as noted above is the expectation that where a child is adopted direct contact with siblings either in care or living with birth relatives will cease.

*You know, and, again, it kind of gets you through most situations that you work on pretty much an assumption and a general principle that when children are adopted, they don't have any direct contact with their birth relatives. (Guardian 5)*

*I think the starting point is if you're placing a child for adoption, it is unusual for it to be an open adoption and direct contact with a sibling. (Judge 4)*

*So it's almost like, well, if they go for adoption, the needs of that child is to have contact severed. If they stay in the family, the needs of that child is for contact to continue. So actually the needs of the child morph depending on what the placement is so do we actually really know what the needs of the child are or do we just actually tailor the needs based on the placement type because most adopters. (Guardian 5)*

Underlying this is the view that placement is more of a priority and outweighs concerns about contact.

*In some cases lip service is paid to it [that contact essential], so it's said but, you know, ultimately they'll say that, you know, if this placement has to be the placement then it's got to be sacrificed, contact's got to be sacrificed at the altar of the placement. (Barrister 3)*

*But if you had a perfect placement but they wouldn't consider sibling contact, first of all I would say that's not necessarily a perfect placement, but secondly you would always take the placement I think. (Guardian 2)*

### Indirect contact

It is important to emphasise that what is being spoken of here are forms of direct face-to-face contact. The case review and the interviews and focus groups confirmed prior research findings (Neil, 2018) that indirect contact was widely accepted as conventional practice post-adoption. As a barrister commented:

*I mean you tend to find that local authorities will argue and the courts will accept that your identity needs can be met by way of indirect letterbox contact. You know, you'll know who you are, the family you've come from and you'll get an idea of that without having to see family members face-to-face. (Barrister 1)*

<sup>40</sup> *Re C (A Minor) (Adoption Order: Conditions)* [1989] AC 1, Lord Ackner at para 18 (emphasis added).



The judgment in a recent case is an example of conventional judicial thinking and expectations:

I wish to stress that I am deeply conscious in this case, as in most cases involving adoption, that C and his sisters are likely to outlive most or all other relatives connected with them, and that the legal effect of adoption would be to sever lifelong the legal relationship between them. They would, however, be brought up with continuing indirect contact and knowledge of each other, and the capacity to resume a social and emotional relationship in adulthood if they wished. (*Kirklees Council v LS*, TL [2018] EWFC 12, Holman J, at para 45)

The approach here reflects the government guidance which emphasises that in adoption:

...all concerned need to understand that the purpose of any such contact, if it is to take place, is fundamentally different from contact that would normally be arranged between children in care and their families. (DoE, 2013, para 7.8)

While indirect contact can take different forms, what is emphasised is not so much ongoing contact but factual knowledge of and life-story work; the direct/indirect binary often reflecting a distinction between the present (childhood) and future (adulthood). This is especially the case where siblings had no prior actual relationship, as one solicitor noted:

*It keeps the door open, you know, so it maintains a degree of relationship, just an awareness of the fact that this person exists and an avenue that if they get to an age where they decide that they want to look up their family they can.* (Solicitor 9)

From the perspective of an older sibling the benefit of indirect contact was described by a solicitor in minimal terms as simply being that, 'they have a reassurance that their sibling is...I guess at the most basic level they're still alive'. (Solicitor 9)

One of our young advisers indicated the complexity of the message this sent to young people:

*Well it's like kind of as well they're kind of throwing away like an opportunity of finding a solution to this because the way they see it is well once they turn 18, the child that's adopted can then make contact with birth family but...they've already had major life without that sibling that's been in foster care so it's kind of discouraging that kind of contact anyway...you're just kind of pushing something under the rug and hoping something happens in like a couple of years' time when it's not their kind of responsibility really.* (YPPG2)

Others in the group similarly commented on how confusing it might be:

*It will affect him, yeah, because he'll know that he's got all this other family that he's not part of.* (YPPG2)

*Because he'll be in school and people will be going on going, 'Oh yeah, my sister got me this'... 'I went to this place with my sister'. 'Me and my brother's done this, that and the other', then he's going to be sat there like 'I'm aware I've got brothers and sisters but I don't actually'.* (YPPG1)

In the legal analysis in placement for adoption proceedings, a judge noted that: 'I can mitigate the loss by having indirect contact, life story work and so-on' (Judge 2). But at the same time concerns were raised about their being 'insufficient analysis of...the pros and cons of direct or indirect contact' (Solicitor 6). As a social worker noted:

*if the plan is for adoption it's a kind of almost like a script where it's, you know, yes, indirect contact of three times a year, photographs, birthday cards. It's almost like oh right, yes, I'll put that in that one so it's cut and paste.* (Social Worker South Focus Group)

In the context of social media there was a lack of clarity about what type of contact it represented:

*I don't know, is it direct or indirect contact, I'm not sure really?...It's indirect because if you're using social media you're...I mean I don't use social media so I'm a complete luddite when it comes to something like that but it tends to be by messaging rather than by visual, doesn't it?...It's an area that the court cannot regulate.* (Judge 4)

We discussed this with our young advisers and they expressed a similar ambivalence about how to categorise forms of technological contact.

*I don't know how to describe it but like if you hugged them and all that so there's that like emotional bond and like when it's just Facetime and that, it kind of takes the great qualities of like meeting up with someone away. (YPPG2)*

*...when you think about it, like indirect without face-to-face, isn't it, so like technically it is indirect but then the message is going straight to that person so technically it is direct. (YPPG 2)*

One solicitor appeared to suggest that it was a form of direct contact, contrasting it with letter-box contact.

*I think I've seen care plans actually that say if the children are far away, you know, that must be at least a Skype conversation every couple of weeks and so, yeah, I've certainly seen that but in terms of social media in terms of the older children and the adopted children we don't... We just try and keep it to letterbox. (Solicitor 3)*

A solicitor noted that social media resulted in pictures sometimes no longer being included as a form of indirect contact, because of the potential risks attached.

*That's why everyone's reluctant or a lot of people are reluctant for this to include photos. The idea that that would give a... make it easier to trace someone via social media. It is something that generates a lot of... I guess a lot of concern about people tracking people down. Again, even in the relatively short time I've been doing this, it used to be quite routine for the indirect contact to include photos and now the opposite is true, it almost invariably doesn't and the reason that's cited is for, you know, the risk of identification, security placement sort of thing. (Solicitor 9)*

Similarly a judge noted at the 'celebration of adoption' hearings at court: 'in the standard invitation that we send out, we routinely advise not to post photographs of the child on social networking sites because you are running a risk' (Judge 4).

## The 'rights' of adopters

A key finding was that the impact that law and practice can have on contact arrangements was significantly influenced by practitioners' understandings of the 'rights' of adopters and their perceptions about what adopters want or are willing to do. Requiring adopters to facilitate direct contact was, consequently, sometimes perceived as not possible in law and sometimes simply as impractical or ineffective, regardless of the views of the practitioners, and there was a constant shifting and tension between these distinct rationales.

*Well I mean there'd always been the idea that open adoptions were good but once someone's adopted, I mean that's your child and then it is up to you to decide whether you go along with that. (Guardian 4)*

*Family finders I think influenced by, you know, the research will emphasise the advantages to prospective adopters of encouraging that kind of contact but, you know, essentially also they will be told that it's really up to them and if they feel uncomfortable about trying to promote contact with an older sibling who's in touch with the parents then they won't be required to do so. (Barrister 2)*

*There's still a sense that, well, it's got to be the adopters who decide and in realistic terms, yes, they're the people who've got to live it. (Solicitor 2)*

Reflecting the views of the group generally, one of the young advisers expressed bemusement as to why a change in legal status should dictate sibling contact, as she asked:

*....so why should that stop her from having a relationship with her brother just because they gave them their official parental rights? (YPPG1)*

Sometimes practitioners indicated that they considered that the concerns of adopters were often reasonable and child centred.

*I've seen when they've struggled when they've gone to contact with a sibling or whatever and then been really angry at the adopters; why are you keeping me away from my siblings or my mother or whatever it is and you've then got either whether in foster care or adoption trying to manage that difficult behaviour, you know, or the fall out of that and so that then I suppose they just think it's easy not to do contact but*

*they think it's in the best interest of the child to not put them through that stress so (Social Work North Focus Group)*

*You know, although we can intellectually say, 'Yes, it's a wonderful thing to have a relationship', you know, it does...actually they can bring lots of instability and, you know, that the child you're looking after's sibling maybe, you know, chaotically using drugs and you might be thinking I want to protect them from that. You know, it's not all, you know, keeping the sibling away because, you know, you don't value relationships or whatever, it may be for, you know, genuinely for reasons of protecting and promoting the young person that you've got the care of. (Guardian 4)*

There was also a suggestion that not all adoptive parents are necessarily opposed to direct contact and that where there had been a change this was sometimes informed by a child centred perspective.

*Well interestingly I think where that happens it's often because the adopter... the adopters themselves can see, ah, the child's really struggling here, I think it would be quite helpful if the child could actually possibly meet family members. (Barrister 2)*

But a recurring theme suggested that concerns about direct contact were often about the feelings of the adopters and not focused on the interests of the child. This view was expressed clearly by two guardians.

*And I can remember I was really, really concerned about the adopters' motives for that because they just seemed to want to cut the birth family off and I was very much almost not prepared to support adoption because of them. I could understand why they didn't want the parents to have contact but I could not understand or change their minds about the sibling contact and I thought that that was very harmful to this child to grow up because he had been...He was, what? Eight / nine? And the contact was stopped which I felt was a great...psychologically harmful to him...And the boy wanted to still see his siblings...It was a sad one that they could not see the benefit for him of...I think they felt it was their own insecurities. (Guardian 3)*

*Look, I think if you feel threatened by contact with birth parents or with siblings then I'd worry about you as an adoptive parent to be honest because somehow you haven't got over the loss of having your own children and you'll somehow want to make that child your own and as we know, no children belong to any...no child belongs to anyone, even birth parents. They don't belong. (Guardian 1)*

A young adviser identified that the absence of contact might create a 'normal' family life for the adopters, but that this did not necessarily equate with normal for the separated siblings.

*When you think about it with the court and all that they always try and consider to keep the routine or not disturb like the child's life and all that, try to keep it as normal as possible, but they're separating the siblings from each other. How's that keeping it as normal as possible when in reality in like the most perfect home you get to see your siblings? (YPPG1)*

A judge offered a succinct explanation for this: 'Adopters want nice, clean children whom they can call their own. I'm sorry, it's just dyed in the wool' (Judge 2). At the same time there was an awareness that adopters were not all the same and an implicit understanding that their responses to contact are informed by a combination of their own feelings and practical concerns, as a solicitor here suggests:

*And you have lots of people who are open for that to happen and lots of people who are not because they don't want it to remind them, they, you know, they don't want it disrupted. Yeah, it's tricky. It's tricky. (Solicitor 3)*

The possibility that the emotional security and comfort of the adopters was or might be a legitimate factor to take into account when considering the child's best interests was not referred to by any of the practitioners. This silence is significant because in the context of private law disputes in relocation cases it is explicitly accorded some, albeit not decisive, weight (George, 2015).

Practitioners' own awareness of the complexity of the situation are captured in a guardian's critique of the resistance by adopters to contact and at the same time a child centred defence of the conventional practice.

*...the people who are adopting aren't mature enough to think actually this isn't my child, this is a child with a history and my need to have a nice life with a little child absent of any complications with their birth*

*family...I think sometimes...children just need to get on with childhood. You know, all these complicating factors and managing contact with people that they can't live with...and then I do fall back into the camp of actually just saying goodbye and enjoying a childhood free of, you know, the stresses of trying to manage those dysfunctional, heartbreaking relationships is actually probably is preferable so long as the links are maintained when they're older. (Guardian 3)*

## Undermining the placement

The tension between the feelings of adopters and welfare based concerns about contact are most acute in the context of assumptions that direct contact with siblings who are living with or in contact with birth relatives will undermine the placement. This concern dominates discussion about post-adoption contact and the weight placed on this factor was evident from the case review and from the interviews. The language used demonstrates the extent to which the concern functions as a generalised unquestioned assumption to the extent that in practice it is a powerful presumption that is hard to rebut.

In one case it was clear that despite the evidence of the closeness of the relationship, contact was dependent on all the children being adopted.

*A plan for adoption means that hopefully she will be able to have contact with her big sister assuming they are both adopted...I very much hope then the girls can grow up having the best possible relationship as we know that sibling relationships are the most long lasting. (Leeds City Council v X, J (through her Children's Guardian) [2014] WL 5311835 HHJ Lynch, at para 34)*

Similarly a local authority solicitor commented that:

*Well, we have very, very good adoption workers...and if they feel that sibling contact is something that should be...then I doubt that they would actually place that child. I mean clearly what I'm talking about is contact between the adoptive siblings rather than anybody else because I think, you know, as I said earlier, contact between adopted siblings and siblings in long term foster care is quite unusual because of the difficulties that they are still contacting the parents. (Solicitor 3, emphasis added)*

Two solicitors referred to the concern as 'obvious'.

*it's the linking and the obvious anxieties that if the other siblings are having contact with the birth family then there's anxiety about information seeping back and the risk of placements breaking down. (Solicitor 2).*

*The difficulty you have is obviously sometimes when you sort of mention siblings and contact in adoptions, sometimes the siblings do remain at home...that'd be a situation where...by having contact with the younger child having contact with the older child and potentially upsets the placement. (Solicitor 8)*

One judge emphasised the routine nature of the argument.

*Well there are some local authority beliefs that you get trotted out on a regular basis. So a child who is being placed for adoption...cannot have contact with an older sibling who is being placed in foster care because the child in foster care is going to be having an ongoing relationship probably with birth family and if he or she has contact with an adopted sibling at the same time, there is a risk of the birth family getting information about the adoptive placement that could destabilise the placement. So that's a common argument that's run by local authorities...they are raised in a knee jerk way rather than on the facts of the case necessarily. (Judge 4)*

A barrister suggested that it was an assumption not necessarily based on an assessment of the child's best interests, that it was a consideration that is 'led by the interests of the adopters rather than the interests of the children' (Barrister 3).

The young advisers expressed very strong views about what they considered to be the unfairness of concerns about birth parents preventing siblings from meeting; that denying contact on this basis from a young person's perspective was a punitive outcome, stretching the 'punishment' of 'failed' parents to the children:

*YPI1: It's nothing like really bad, it's nothing bad to see the baby because like it's the parent that's done something wrong,*

YPI2: *And it's not someone's fault. It's not the children's fault. And that's what you've got to figure out, isn't it. You've got to explain it's not their fault.* (YPPG 1)

Judicial responses to the argument are evident from the case law. A recent Court of Appeal case reveals both the embeddedness of the assumption and how it restricts contact, but also that it outweighs rather than precludes a recognition of the importance of sibling relationships:

So far as contact between the sibling groups is concerned, the matter is slightly different. The judge simply does not mention this in her judgment. In an adoption case, often the potential for contact between siblings is as important, if not more important, than contact with the parents. As a matter of human fact, the time that one is a brother or a sister would normally be a longer length of time than one is a child or a parent, yet the matter is not mentioned by the judge...I have gone back to the detail that lay behind the expert evidence. It is plain there that each of the older children had more developed, more difficult and more entrenched behavioural difficulties than the younger three and *were obviously going to continue to be in touch with their mother through contact and with each other. The potential for a child moving on to adoption, if adoption was justified, in being disrupted by any form of direct contact with these siblings is, on ordinary social work and family justice principles, unlikely to justify continuing sibling contact. So although the judge does not deal with the point, I cannot see there is merit in putting the matter now back to the judge for further reasons to be given.* (*In The Matter of W (Children)* [2014] EWCA Civ 1303, Macfarlane LJ, at paras 59, 60, emphasis added)

In another case concerns about the potential undermining of the placement coupled with the views of adopters is such that it outweighs the acknowledged and strong views of the children themselves:

Whilst I have absolutely no reason to think that the children would not get on with each other, and indeed would not gain a very considerable benefit from their relationship with each other, indeed were keen when they were spoken to very recently to restart contact, balancing those advantages with the disadvantages, that is, of the pressure, *the likelihood of an incident way beyond speculation and of the lack of support from the prospective adopters*, means that I am constrained to say, that the order that I must make is that of reasonable indirect contact only. (*London Borough of Haringey v Musa* [2014] EWHC 2883 (Fam) Newton J, at para 28)

Concern about this was expressed forcibly by one of our young advisers:

*I don't like the fact just because one child's like younger and they're able to get adopted and they'll like end up losing their older sibling and basically their older sibling is going to lose out on something just because people are so worried about the birth parents. It's like it's meant to be child-focussed but it's only child-focussed on the adoption family, not actually child-focussed on the child in foster care whatsoever.* (YPPG2)

An IRO referred to a case where direct contact across the adoption/fostering placement divide did take place; but it is an exception that effectively proves the rule because of the imprisonment of the birth parents:

*So the plan for the younger one was one of adoption and it's worked really well in that they have direct contact once a year with the children in foster care. I have to say that the parents of the children are in and out of prison, there's been no direct contact with parents for the last few years so that works well with this.* (IRO North Focus Group)

### **'so long as it's perceived as not undermining the placement.'**

A barrister observed that:

*Over more recent years, the discussion has been principally, hasn't it, about degrees of openness and the argument is that generally speaking a degree of continued contact on a spectrum from indirect up to direct can be helpful so long as it's perceived as not undermining the placement.* (Barrister 2)

The final reference here to 'so long as...' mirrors the approach in private law disputes about contact where the expression 'so long as it's safe' reflects how concerns about domestic violence have become the only legitimate way to challenge presumptions about contact between children and parents (Reece, 2006; Kaganas, 2013). But in that context there is often detailed evidential analysis of the basis of the concerns: a mother has to prove to

the court that her concerns are valid and those ‘who oppose contact...have been constructed as the problem’ (Kaganas, 2010, 35). In this context however there appears to be little analysis of the claim and considerable if not decisive weight is attached to the perceptions of the adopters despite the recognition or sense by practitioners that, as one social worker noted: ‘I think a lot of adopters are quite nervous about that, even if it is okay’ (Social Worker South Focus Group).

It is important to emphasise that our finding here is not that the concerns about the potential undermining of placements are necessarily wrong, rather, how as an assumption it functions as powerful common sense knowledge claim in legal proceedings. Identifying the concern as a barrier to direct contact is not in any way new (Neil 2018). Our findings confirm this but identify how it informs legal as much as social work decision making.

## Social media and technology

In the context of concerns about the undermining of adoptive placements a recurring issue was the impact of social media, which cohered with the references to this in the literature (Mcfarlane, 2018; King, 2013) and the guidance (DoH, 2015, para 2.94). Most of the practitioners identified it as a risk:

*It comes up in the context of disruption of adoptive placements quite a lot because obviously it's contact which is unregulated, unauthorised and can be very destabilising...It's a bit toxic to put it mildly. (Judge 1)*

*It's more talked about in my experience as a problem in terms of undermining the security of adoptive placements. Yeah. (Barrister 4)*

The association of social media with risk is reinforced by the reference in the government guidance to social media only in the context of ‘unauthorised contact’ and of the ‘harm unauthorised or unmediated contact can have’ (DoE, 2013, para 5.5).

A social worker provided the following example:

*Facetime was actually in the adoption, you know, in that plan but it did have to change because of you can't completely...you can't stop a child in the middle of Facetime saying ‘I live at such-and-such’ so it was quite tense at times and it did stop because the girl was in Scotland and you could tell that the older boy was asking questions and it could actually...And it was upsetting for him because then through Facetime he heard that his sister had seen the younger brother, they'd been off to London Zoo together and you couldn't just literally switch the phone off in the middle so it does depend on. (Social Worker South Focus Group)*

A judge however was critical of the lack of creativity in developing ways of addressing the potential risks:

*Why can't you have Skype with a delay? A seven second delay but you can then if they say something... You know, I'm not a technical person but I mean I know it's possible to do and then if they say something that they shouldn't say, you can just stop it...But they say ‘that's when they're much older and then of course they will start finding each other and we know we can't stop it but at this stage for security of the placement’. (Judge 3)*

Others also spoke less of resisting the challenges but of engaging with them. Here it was explicitly perceived as enhancing more open adoption.

*Given the ubiquity of digital communication, social media and that sort of thing, the idea, even if it were desirable which many increasingly question that it isn't, that adoptions maintain relatively closed, the practicality of doing so is rather less. (Barrister 2)*

*It's far harder to maintain a principle of no contact with social media available...I don't see how you can maintain that severance...until the age of the internet, if you lived in this country you believed our system was the only way to deal with it and everybody else deals with adoption in the same way. I think the global nature of the mutual access to material shows you that we're very much the exception and I think families and people won't accept it as readily as what happens in every case...So I do think social media and the internet presents real challenges to the traditional model of adoption and whether it can remain practically the very closed system that we operate today. (Solicitor 6)*

One solicitor captured the ambivalence about it by talking of different perspectives:



*These siblings are going to find each other and that's brilliant, that's good I think in some ways...I mean with my adoption hat on I'm really worried about it but I think in terms of siblings I think it's got great possibility of keeping them together. (Solicitor 3)*

## Ordering contact alongside placement – Section 26

The case law review provided extensive evidence of resistance to the use of court orders to support contact between siblings in adoption proceedings. The traditional assumption that no contact is *desirable* is less evident, although in many cases the issue is still mentioned almost in passing and seemingly casual assumptions are expressed about adoption 'naturally' severing a relationship.<sup>41</sup> Where the issue of sibling contact orders is discussed, the emphasis is on respecting the views of the adopters, leaving the matter in the discretion of local authorities and prioritising the finding of a placement. The following are key early statements by the judiciary in cases prior to the enactment of the Adoption and Children Act 2002.

*It seem to me that in any contested adoption proceedings relating to contact, the judge...would be bound to respect the adopters' standpoint...It must, I think, be kept in mind that by adopting these children, the prospective adopters become their parents. This is an obvious truism, but important. They exclusively will have parental responsibility for the children and their position must, inevitably, be given substantial weight. (G (Children) [2004] EWCA Civ 1187, Wall LH, at paras 14, 15)*

*Contact is more common, but nonetheless the jurisprudence I think is clear. The imposition on prospective adopters of orders for contact with which they are not in agreement is extremely, and remains extremely, unusual. (Re (A Child) [2005] EWCA Civ 1128, Wall, at para 49)*

*I know that the local authority will keep in mind issues of contact particularly inter-sibling contact as they seek prospective adopters. However, the prime need at the moment is to find the right family for Z and it would not be right for this Court to make stipulations about contact. (S v M [2003] EWHC 3473, Hedley J, at para 13)*

The case of *Re P (Placement Orders: Parental Consent)* [2008] EWCA Civ 535 raised the possibility that the statutory reforms introduced in the Adoption and Children Act 2002 might herald a new approach towards birth relative contact, including siblings, and the court held that:

*It is not, in our judgment, a proper exercise of the judicial powers given to the court under the 2002 Act to leave contact between the children...to the discretion of the local authority and / or the prospective carers...It is the court which must make the necessary decisions if contact between the siblings is in dispute, or if it is argued that it should cease for any reason. (Wall LJ, at paras 147, 153).*

Commentaries at the time observed that this judgment 'opened the door to a more interventionist judicial approach to post-adoption contact' (Langdale and Weston, 2008: 769). But the court acknowledged that, 'we do not know if our views on contact on the facts of this particular case presage a more general sea change in post adoption contact overall' (ibid para 154). As other commentators have noted (Bainham, 2015; Pepper, 2017) there is no evidence that the judgment led to a 'sea change' and this was confirmed by our case review and in the interviews. The following recent judgments are typical in that while contact is discussed, the prevailing assumptions about 'adoptability' and the emphasis on leaving the matter to the discretion of local authorities and the adopters remain firmly in place.

*The local authority's plan is an entirely conventional plan for indirect contact involving both parents and siblings. The guardian has in her written report speculated whether indirect contact was enough so far as the siblings are concerned, but in her concluding remarks she told me that she had come to the conclusion that indirect contact it would have to be. The reality is that any more than indirect contact...would place difficult hurdles in the task of searching for an appropriate placement, and even if a placement was found it would make the success of that placement more difficult. It must not be overlooked that the important relationships for the child going forward are going to be the new relationships rather than the old ones. (Lancashire County Council v A (Adoption) [2017], WL 03726360, HHJ Duggan, at para 36, emphasis added)*

<sup>41</sup> See, eg, *In the Matter of Re D (A Child)* [2001] EWCA Civ 904; *B.C.C v L and Others* [2002] EWHC 2327 (Fam).

I have considered whether I should make any orders as to contact...I am confident that *if the LA consider direct contact with J is appropriate and in E's best interests and if prospective adopters would promote such contact then it will be implemented*. I do not want to tie the LA's hands in any way...I therefore make no order as to contact. (*Sheffield City Council v C, N, O, The Children by their Children's Guardian* [2015] WL 2190730, HHJ Wright, at para 102 emphasis added)

I share the guardian's concerns about the need to try to locate prospective adopters willing to consider direct sibling contact *but am reassured by the LA indication that this will be pursued*. (*RBWM v H & O* [2015] WL 6395287, HHJ Owens, emphasis added)

That contact is valued but unlikely to justify the making of an order, even when deemed important, finds support in a Court of Appeal case where a placement order was upheld and the following approach to contact was approved:

The judge dealt with ongoing sibling contact in the very last paragraph of her judgment. In effect, she made a note to herself and a recommendation that sibling contact be considered for the long-term future. That recommendation is *one which is worthy of serious consideration by the local authority and any future adopter*. Likewise, a court if asked to consider the question should consider the judge's recommendations very carefully. (*In the Matter of R (Children)* [2013] EWCA Civ 1018, Macfarlane LJ at para 24, emphasis added).

That Section 26 orders for sibling contact are highly exceptional was confirmed by the judges in the focus group; most had no experience of making them or hearing applications for them. One noted that, 'I don't think people think about. Maybe we should' (Judges Focus Group). A similar picture emerged from the interviews with individual judges:

*I think Section 26 is virtually never used. Perhaps we should use it more often...People have taken on board the old case law about don't interfere with adopters' discretion. I think we're still thinking in the 19th century about adoptive placements.* (Judge 2)

*The idea of making an adoption order then with a contact order it just doesn't happen. It's pie in the sky. I am sure the high court judge will tell you we do that but it doesn't happen in the day-to-day courts up and down this land.* (Judge 3)

One judge referred to Wall LJ's judgment in *Re P* in 2008 (discussed above):

*I don't think they're requested that often. And they are granted even less often. I mean in Re P...Wall said he wondered whether the changes to the adoption and children act presaged a sea change...I don't think there's any sign that it has. Whether it should is another issue...I think on the basis of Nick Wall's analysis, you would think that... post adoption contact was going to become more normal. I don't think it has.* (Judge 4)

A barrister also referred to the case and suggested that requests may have been made more in the past, although not, significantly, that orders were actually made:

*I mean I do remember when the case of Re P came out...I heard quite a few arguments at court about older siblings having direct contact with younger siblings who were going to be adopted and I think at the time we thought it was going to be a sea change... but that never really happened...Local authorities tend to oppose orders for contact if there's adoption so...I mean the wishes and feelings of the older children would be recorded and they should be at least as part of social work evidence, in the welfare checklist as part of the guardian's evidence but they don't tend to be reflected in contact orders...It just doesn't seem to happen.* (Barrister 1)

Some solicitors said that they had not seen them being used while one solicitor noted that they were very rare but made the case that applying for them was worthwhile:

*...even if it's just reminding everyone that actually ultimately this is up to the court and it's wrong to imagine it as some sort of blanket provision, that it's simply left to the adopters and that's that and there's no other possible way of approaching it.* (Solicitor 2)

Significantly amongst non-legal practitioners there was almost total silence about Section 26 orders. They were not mentioned at all in any of the focus groups with IROs and a number of the social workers appeared to be unaware of them:

SW1: *You can't make a contact order at that point, can you?*

SW2: *No.*

SW3: *I don't think you can.*

SW4: *No, there's recommendations, isn't there.*

SW5: *Yeah, I think that's all you can do.* (Social Work South Focus Group)

We examine below the different forms that 'recommendations' can take. One guardian however, explaining why she had no experience of them noted:

*I don't think it's reluctance, I think it's just never come up...I think firstly you wouldn't want to put anything that would be a bar to finding a placement so...and that may well do that.* (Guardian 2)

Explanations for the absence of Section 26 orders appear partly to be because of lack of awareness of the provision. But alongside the judges above who queried whether they should be used more often, one judge commented on a lack of clarity and guidance about the provision:

*...there isn't a great deal of appellate guidance on the exercise of our discretion on Section 26. In fact I feel pretty ignorant about it whereas I've got a lot of guidance on other things which is right in the front of my mind so maybe I'd like some more guidance as to how to implement Section 26 and how to look at it, more judicial awareness of it because I think Parliament intended us to be much more open about looking at adoptive placements with the birth family having more access which will of course include siblings...remove some of the impediments for siblings from having contact across the divide of adoption.* (Judge 2)

The lack of clarity about when to use Section 26 is understandable in the context of a wider reluctance to enhance more open adoption practices. As judges in the focus group noted:

J1: *...the notion of open adoption isn't something that's in vogue.*

J2: *It hasn't taken off, has it.* (Judges Focus Group)

Another judge also located his explanation for never having made a Section 26 order clearly within a dominant view of adoption generally:

*That would be quite difficult, I think, and the orthodoxy, I think, at the moment still is very much closed adoptions and that even if it would look desirable for there to be some sort of inter sibling contact, that is very much a matter for the adopters to decide. You know, they would be briefed about it and they would no doubt be urged to do it but ultimately it would be left to them.* (Judge 5)

Precisely because 'open adoption' is still perceived as unconventional it is possible that where direct contact is considered essential or fundamental and, consequently, might justify the making of a Section 26 order, it is arguable that adoption might not be appropriate, an argument all the more likely after the judgment in *Re B-S*.

This line of argument was suggested in an earlier case where the possibility of making a contact order alongside an adoption order was raised by Hale LJ. She held not only that contact orders were, '...something which generally the courts are not willing to impose upon the adoptive parents', but that they are 'designed to maintain a level of continuing contact...which calls in question the appropriateness of the wholesale transfer in legal terms which adoption brings about.' (*In the Matter of B (A Child)* [2001] EWCA CIV 347, at para 24, emphasis added).

It is similarly worth remembering that in *Re P (Placement Orders: Parental Consent)* [2008] the court acknowledged that adoption was not necessarily the only viable option and that their judgment was:

*Predicated on the proposition that the relationship between the two children is of fundamental importance, and that the relationship must be maintained, even if the children are placed in separate adoptive placements, or if one is adopted and the other fostered (para 153).*

The dilemma was clearly acknowledged in a recent placement hearing where the guardian had recommended that intersibling contact was essential. In making an interim order requiring the local authority to reconsider the final care plan, the judge commented that:

*If I accept that this is a key requirement this is most compatible with long term foster care...If the provision of direct inter-sibling contact is so fundamental and central to these children's future welfare, and if this is to be provided at a meaningful frequency, and not a tokenistic frequency, that is at odds with a plan for adoption, despite the possibility of post-adoptive orders (X County Council v AJBM [2016] WL 0082673, Jones HHJ, at paras 104, 106)*

Two solicitors noted how exceptional it would be for contact provision to impact on the making of a placement order:

*I'm just trying to think, are there any cases whereby it is said that if you can't find an adoptive placement that will facilitate contact you then revert to fostering? I think that would be wholly exceptional often.* (Solicitor 6)

*If you're saying, 'actually it's got to be adoption', I don't think any court is going to challenge that on the basis of, 'well, you can't guarantee me that they're going to have direct contact'. I've never seen that done.* (Solicitor 3)

A key issue here is once again the limited nature of the court's powers. In one case a judge attempted to attach conditions to a placement order. The Court of Appeal held that he had no such power. But the reasons why the judge wished to attach conditions reveal the assumptions and concerns in this area:

*I do not feel that...direct sibling contact, should be sacrificed for the purpose of making these children more 'adoptable' in the sense of easier to find a family who will take on their care. If only the normal type of adoption is possible, without sibling contact, it is not for M and K in my view. Only a truly open adoption will satisfy their needs; otherwise the children's needs will be manipulated to fit adoption rather than the other way round. (Re A (Children) [2013] EWCA Civ 1611 paras 7.16 in CA at para 10, emphasis added)*

The Court of Appeal held that had they upheld the placement order they would also have upheld the Section 26 order that the judge had made alongside it. While confirming the right of the court to make a Section 26 it remains unclear, as the judges above noted, when exactly it is appropriate to make such an order. Attaching conditions to a placement order was held not to be possible because 'it is not open to the court to seek to limit or to exert direct influence over the choice of prospective adopters'. But the main reason why courts do not make Section 26 orders is because they are advised and are concerned that by doing so they will restrict the local authority's choice of prospective adopters. Consequently it is not clear how precisely a Section 26 order, which a court has the power to make, differs *in practice* from a conditional placement order, which the court does not have the power to make. This may be one of the reasons for confusion about them by the practitioners, including the judges, and the need for guidance is understandable. If there is a role for law in supporting post-adoption direct contact, Neil has recently argued that a conversation needs to happen about the use of Section 26 (Neil, 2018). Our findings support this alongside the need for clarity about their function.

## Reducing the pool of adopters

The centrality of the impact of 'concerns about constraining the search for adopters' (Judge 1) was a recurring issue raised by all the practitioners. A deeply embedded assumption similar to concerns that contact can undermine a placement, it is particularly significant as an explanation for the reluctance to make Section 26 orders. As one judge noted:

*We shy away from them because we're always advised that if you make an order that adopters have got to facilitate some contact you won't find a placement.* (Judges Focus Group)

*...the reality is, again, that courts are loathe to do that because they're always told... You know, when a court makes a placement order it's basically to sanction adoption and what the local authority will almost always argue there is that if you make a Section 26 contact order, that's going to inhibit our search for prospective adopters.* (Barrister 2)

*You will get a family finder brought to court to trot along and tell you...what the impact that will do on timescales for finding placements and...yeah, the judge's response to that is 'I don't want to limit this child's opportunity to find a lifelong stable permanent,' all that rhetoric. (Barrister 5)*

Evident here too is the concern that the advice provided to courts on this matter is made as a matter of routine and that it might be based on assumptions about adopters without any serious attempt being made to influence them, that, as a judge commented, 'they are raised in a knee jerk way rather than on the facts of the case necessarily' (Judge 4). Another queried:

*I wonder if that now is just taken as a fact or whether anybody really does proper work with adopters to talk to them about the value of the relationship continuing in some form with older sibling. (Judges Focus Group)*

The weight attached to the concern is enhanced by the assumption that contact is a matter for the adopters.

*I think there is a concern about at the end of the day it's their decision whether or not that will happen and so they try not to put conditions on contact, conditions on the adoption in respect to contact so that they don't restrict their pool of adopters. (Solicitor 3)*

*I had some interesting discussions with some social workers...and their perspective was, well,...whilst we as social workers understand all the arguments and understand the rationale and understand the importance of relationships, the cold reality is we won't find adoptive placements on that basis. (Judges Focus Group)*

*It tends to be very much the attitude is, well,...if you put too much pressure on adopters they'll be put off the placement all together. (Solicitor 2)*

One barrister gave an example from her practice acting for a local authority where the concern was effective in rendering the focus of a psychologist unrealistic:

*So the older sibling and the parents were relying on the psychologist saying, 'The sibling relationships are really important, bla-de-bla.' And I was saying to the judge, 'Yes, but the psychologist doesn't have experience of adoption and finding adopters whereas X witness does and it will have a huge impact on the number of adoptive placements that are available.' And that gets prioritised by the court to finding an adoptive placement. (Barrister 1)*

But others note how realistic the concern is and the damaging effects when courts do impose restrictions by influencing the care plan:

*They really struggled to find adopters that would consider any contact with siblings. So now the adopters that they've gone for, it's on the understanding that they might consider indirect contact but they would not consider any direct contact. When we were in the court process, the court was saying that they needed to specifically look for adopters that would be open to direct contact with siblings but it just got in the way. (IRO North Focus Group)*

*I remember a few years ago I did do a case where the judge wanted direct contact...and the judge felt strongly enough about it, it was part of the care plan the local authority had to accept it and I suspect in reality that was very problematic finding adopters who would facilitate that. (Barrister 1)*

One judge accepted the legitimacy of the restrictive impact of making a Section 26 order, but at the same time made clear that it is for the court to make the decision:

*I do accept that to make a Section 26 order is going to make it more difficult to find an adoptive placement for that child. I accept that as a principle. Sometimes it's a price that has to be paid. That's where I part company with the local authority. (Judge 4)*

The expression 'a price that has to be paid' makes clear the acute discomfort such decisions pose. It resonates with the other charged word that arises; 'sacrifice'. Where this line is crossed is hard to say: the data does not indicate what it is that would require or justify the making of a Section 26 order. Another judge highlighted how concerns about limiting the pool of adopters required an inherently difficult welfare assessment to be made:

*The court has to make two key decisions. The first is, how important for this child is ongoing contact with another sibling or a parent and how important is it for that child to have a stable adoptive placement?*

*And the answers to the two things may run counter to each other and then you have a hard choice to make. (Judge 4)*

If Section 26 orders are only to be made in cases where without sibling contact adoption would not be acceptable then it is arguable that an alternative to adoption is adequate. As discussed above, it is here that the discussion about Section 26 orders implicitly merges with the wider debate about *Re B-S*. The space for individual judicial discretion is wide here as one judge noted in the context of not making Section 26 orders:

*I think it just depends where you're coming from, doesn't it, your own life experiences and so-on and I just feel quite passionately that...I mean the prospect of a large sibling group being split up into its constituent parts with potentially no ongoing direct contact, leaving them in a position where they may or may not be able to make contact with their siblings in later life, I just find that personally quite difficult to get my head around. (Judge 4)*

## Timing

A key practical explanation for not making Section 26 orders concerned the timing of the orders: that addressing questions of contact at the placement stage was impractical.

*J1: And also the idea is that that would be sorted out when you've found some adopters.*

*J2: You don't have adopters, you've only got imaginary figures so you can't make any kind of meaningful order. (Judges Focus Group)*

For another judge the question of timing was such that the function of Section 26 orders was questionable:

*The court is entitled to make an order for contact but of course the whole matter has to be considered when the adoption application's made in any event so it's a bit academic....it's almost a pointless exercise except in terms of setting up a marker, I suppose. (Judge 1)*

A solicitor who had unsuccessfully applied for Section 26 orders explained the reasons for the refusal in a way that supports the judicial view above:

*It's a sensitivity towards a situation that we don't even know how it's going to work out, you're almost sort of gazing into a crystal ball when say you haven't even matched a child to adopters and are you really going to put this stricture upon people without even knowing who they are and how it might work out so it's quite difficult to say that it's absolutely necessary to have this contact. It's difficult to persuade judges to, as I say, put that stricture upon the situation. (Solicitor 2)*

This is particularly important as it has been argued that without a Section 26 order it is easier to avoid the issue of post-adoption contact at the adoption order stage (Bainham, 2015).

## Alternatives to Section 26 Orders

A key finding from the interviews and focus groups is that while there was a broad agreement about the reluctance to make Section 26 orders, this did not mean indifference to the issue of post-adoption contact between siblings. And instead of ordering contact, often explicitly, a variety of alternative legal and practical initiatives were emphasised, as one judge noted: 'It's an issue that you find a way through without making an order' (Judge 4).

## Training

*A barrister expressed the view shared by many that: 'Adopters don't seem to anticipate contact as part of the package. It's, you know, it's still quite an archaic approach to things'. (Barrister 5)*

In response to this perception a number of practitioners emphasised the importance of training and support being provided to adopters in order to address their fears about and highlight the benefits of direct contact with siblings. The social workers and guardians spoke most positively about this:

*There's definitely a move and I think that's coming sort of around sort of when they're maybe speaking to prospective adopters about this is what we want to encourage for the future and, you know, there's definitely lots of talk about it. (Social Work North Focus Group).*



*I've done adoption training and I really emphasise that...very much push that actually they're better doing contact and having some management and control over it rather than a child reaching an age where they can jump on a bus or a train and just go and meet somebody who potentially is a stranger and they don't know, you know. (Social Work North Focus Group)*

*And so the first thing is people always go to these adoption information evenings and what basically the local authorities do is scare the shit out of them...they start off with that old fashioned view 'oh I'm going to get a nice little baby' and...actually it's when they go to those information evenings and when they are going through the process that they realise that actually you are probably not going to get a baby and there's older children and there's this to consider and there's that to consider. And, you know, 'have you considered the benefits of open adoption?' (Guardian 2)*

Another social worker emphasised the importance of the voluntary nature of this work with adopters:

*As soon as I sensed not the resistance but the anxiety from the oldest child's adoptive parents, I kind of said there's no expectations, there's going to be no actions from this meeting, it's just a way of starting a ball rolling, of letting you all think about this. (Social Work North Focus Group)*

The impact of social media was raised in the context of training as a pragmatic necessity in order to prepare adopters for the eventuality of contact being established:

*So, no, I mean only in the sense of the protective keep apart, keep apart, keep apart rather than often I'll be the one saying, 'Well if you're going to be finding each other anyway, don't you want it to happen in a controlled, supported, responsible way where if it has an effect you can put in therapy, you could support them, you can manage it, you can make sure it's safe?' (Barrister 5)*

*I like to get in there first and organise some kind of contact that's supervised because they're going to do it anyway. They're going to go. They're going to get in touch and they're going to go over there whether we like it or not so if we can get the family to work with you then you're less likely...and to actually tell you when the child goes there when they're not meant to, that if you can get the working relationship before they're actively on social media because otherwise they can disappear off the face of the earth really. So for me it's a big one, you know, to think about. (Social Worker South Focus Group)*

Legal practitioners were supportive of training but unclear about how widespread such training was and more doubtful about its impact. A solicitor thought training for potential adopters should say:

*...look this thing is something that's really, really important and perhaps that's, you know...and maybe if there's greater emphasis at that training stage for them whereas, you know, here it's very much a culture of like okay, I've got my adoption order, that's it. (Solicitor 4)*

Similarly from two judges in the focus group:

*J1: And I wonder...whether anybody really does proper work with adopters to talk to them about the value of the relationship continuing in some form with older sibling. Is that now...should be included in the adoption training? I don't think it is. I think it's still...*

*J2: I asked that question. I'm bemused because my understanding was that this was a core part of training for adoptive parents about the birth family relationships and the response was, well, it might be but the reality is that's still not what the adoptive couple typically will want. (Judges Focus Group)*

Another judge was more sceptical of training and emphasised the concerns about the undermining of placements:

*All right, or they're not given adequate training and the sort of people who are selected as adopters aren't open to the idea of contact because they're so neurotic about having their identity blown. And no matter what sort of work they do with the children, life story work and all the rest of it, they're really not keen on contamination from the family. (Judge 2)*

## Selecting adopters open to contact

Rather than resorting to law to enhance the possibility of direct contact, a number of practitioners mentioned the importance and shift in practice in the process of selecting adopters. The underlying assumption here was that 'good' adopters would be open to contact taking place and the role of local authority and social work practitioners was to ensure that where appropriate only those prospective adopters would be selected.

*I mean it's our job to really drill into that...if I got a sense that people kind of weren't committed to that, that's fine but you're not right for these children...I think we've got to use our nouse and our skill to really work out are these people going to be able to stick with what they're saying and commit to what they're agreeing to?... And that should be part of good social work practice anyway. (Social Work North Focus Group)*

*I would argue that if that family don't want contact with the birth family or siblings it's not the right placement for a child. So I would argue that...I think. (Guardian 1)*

*There are some local authorities who will always say, 'We will only recruit as adopters people who will at least consider open adoption.' You know, I can think of a few...local authorities for whom that's the policy. That doesn't necessarily translate into open adoption in a particular case, just that they have to be willing to consider it and that seems to me the fairest way to approach it really. (Solicitor 2)*

As the solicitor above notes the consequences of a selection policy is uncertain, there are other factors to consider. There is also no legal oversight of training and selection processes and reliance on them places the responsibility for contact with local authorities and adoption agencies.

## 'Recitals' and 'recommendations'

The case review revealed that the courts find alternatives to court orders as a way of asserting the importance of contact between siblings. For example, in declining the make a Section 26 order the judge held that:

*...it would be significantly in their mutual best interests if their sibling relationship could endure in some form...I do not propose to make any order in this regard...because I wish to take no step which may impede a swift and satisfactory placement of TY. I nonetheless direct that prospective adopters should be made aware of my views. (Newcastle City Council v WM, AM, JR, TK, MY, SM, HY, HA, TY (children, by their Children's Guardian) [2015] EWFC 42, Cobb J, at para 88)*

The same judge in a later case reaches the same conclusion – not to order contact – but goes one step further than requesting that the adopters are 'made aware' of his views by proposing:

*...some recorded acknowledgment on the face of the order: i) of the open position of the Xs that they regard contact as in A's best interests; ii) that they are agreeable to direct contact...On the basis of such a recording, I cannot conclude that it would be better for A that I make an order. Indeed, it would be better for A to know that her adoptive parents were able to agree wholeheartedly with the proposal for contact without the need for court intervention. (Re W (Adoption: Contact) [2016] EWHC 3118 (Fam), Cobb. at paras 66, 67)*

We explored these initiatives in the interviews and focus groups and a key finding was that there is widespread recognition of these practices. The interviews revealed that while the purpose of these practices are the same they are referred to in different ways and are made in different places. They were most often referred to as 'recitals' or as 'recommendations' but also as occurring 'in the judgment', 'written on the order and accompanying that order', as part of the order itself (although not to be confused with a contact order), or as a part of a schedule to an order. Part of the confusion here is these recommendations are also referred to as sometimes being in 'an updated care plan' or 'in the plan' and sometimes as a 'preamble'.

Some of the interviewees confirmed that judges propose them as alternatives to orders:

*Judges generally speaking are...I mean are very keen, you know, to include recitals... will urge family finders to make prospective adopters aware of the potential benefits and so on...they're quite happy to put down a marker. (Barrister 2)*

*...it was what you do get judges sometimes...She didn't make an order but I think she put it...it was reflected in the order in terms of saying that the local authority will use its best endeavours to promote contact...So it's not an actual order saying there will be contact but giving a very strong indication, yeah. (Guardian 3)*

Some judges confirmed that they often include them on their own initiative:

*We might...It might be a case where that's, you know, so important that it was worth saying and not just letting...not relying on people to assume that sibling contact remained important. (Judge 5)*

*I record it in the order...I say in the order and upon the court recording that on the evidence before at the moment it would be beneficial for there to be ongoing sibling contact if X, Y or Z were adopted...and upon the local authority to confirm that they will share this order with any prospective adopters and will ensure that in any placement... any order for adoption...any adoption application they will draw this attention to the judge if it is not me. (Judge 3)*

*I always put a recital for the judge that looks at the adoption application which should be me but if it's not me somebody else, that they must explore before making the adoption order the issue of sibling contact. (Judge 3)*

But the interviews also indicate that they are sometimes made in response to direct requests from practitioners. So for example, a barrister noted that: 'I mean if you're representing parents you'll advocate it very strongly' (Barrister 1). And another that: 'If the judge doesn't do it then I will ask for it' (Barrister 5). A solicitor thought that 'more guardians are asking that it is...an essential part of the plan' (Solicitor 8) and another said that, 'when you're acting for a parent you will make sure that recitals go in that reflect what your client wants to happen'. (Solicitor 10)

Responses to these requests vary, as one barrister noted there are 'some judges who are absolutely with you all the way and will almost pick up the thread the minute you say it' and others are 'not necessarily interested in that' (Barrister 5). One Solicitor suggested that judges who were in some ways more ambivalent about closed adoption were more responsive to such requests:

*...if you've got that mindset anyway and you're thinking in terms of, you know, there is an argument, here it is up to the court, it's definitely easier to persuade a judge to add that in and to make those signals to prospective adopters that this is the expectation. (Solicitor 2)*

The degree of judicial support can impact on how and where the concern is registered. According to one barrister, mild support might result in 'a line in the judgement, "it would be nice if"...', while stronger support will result in a judge saying: 'I want an amended care plan which acknowledges this.' (Barrister 5). A solicitor noted that often in the care plan:

*There'll just be we propose that there will be intersibling contact if the adopters agree. Nothing more than that...So I literally think it will be one line. (Solicitor 10)*

What is very clear is that the use of these 'recitals' are often connected to perceptions about the possibilities of the court making an order for contact under Section 26. A barrister noted that, 'they will far prefer to say, "Oh we'll put something in the care plan"' (Barrister 5). Sometimes the request is made as a compromise in response to a judicial refusal to make a Section 26 order:

*...she [the client] wanted there to be an order for direct contact to continue and the judge wasn't that keen on the idea of that so we ended up in the situation where it was recorded on the order. (Solicitor 9)*

Similarly another solicitor noted that:

*Yes, yes, that's much more likely because they can't...Judges are reluctant...they're quite happy to have it recited in any orders or they'll say it in their judgement that obviously I cannot tie it but I'm firmly convinced on all I have seen and heard that it'd be entirely appropriate and very much in little thingy's best interests. (Solicitor 7)*

However another solicitor noted that they are also sometimes made at a later stage at the point of the adoption order and that this practice had increased and was a response to older children being adopted; his observation attests to both concern about siblings alongside leaving the question of contact to local authorities and adopters:

*Since we had the push to adoption under Tony Blair's regime the ages for children being adopted have got older and older so they really have established relationships, memories. So judges are alive to that. Not all of them, some more than others, but generally family judges are alive to that and there will be cases where particularly with older children a judge will say I'm making the order for adoption but I want it to be noted that the adopters before I approve this adoption order have agreed to contact or they recognise that having contact with sibling B is vitally important. (Solicitor 6)*

## The purpose of 'recitals'

The interviews revealed different understandings of the purpose of such statements and of distinct potential audiences. A key aim identified is the desire that it will influence local authorities search for suitable adopters:

*It's a very strong encouragement,...it should inform first of all the search process because any prospective adopters should be made aware of this very significant welfare issue relating to the child and of course it also feeds into the adoption application (Judge 1)*

*...try and put pressure on the local authority for that to happen and they'll put it in a recital. (Solicitor 5)*

*...build in the expectation that they focus on looking at adopters who are willing to facilitate direct contact. (Barrister 5)*

*...will urge family finders to make prospective adopters aware of the potential benefits and so on and so forth. (Barrister 2)*

*...to make those signals to prospective adopters that this is the expectation. (Solicitor 2)*

Another function is linked to the lack of continuity of professionals:

*...That's one of the reasons why you want something recorded on the face of the order because it may be a different judge or a different court dealing with the adoption application. (Solicitor 1)*

Similarly in the context of future potential challenges by a birth parent of a sibling, one Solicitor noted that:

*...you couldn't apply to court to enforce that but equally if she wanted to...if there was to be any court proceedings in the future, you'd have to show good reason why you departed from what was an agreed position at that time. (Solicitor 9)*

Sometimes the recommendation is for a time-limited search for adopters that agree to direct contact. Similar to the time limited searches for joint adoptions, discussed above, these can be included in the care plan, but are perceived as having the same legal status as recommendations:

*So you are told in great detail why if you make that order, you will limit the options available to this child and what you get is you get an agreement usually that they will search for a placement that will allow sibling contact, but that at a certain stage they will stop...it'll be a desired argument but it won't be a pre-requisite. (Judge 3)*

*I've had ones where they'll say well they should prioritise within the first three months adopters who are willing to support direct contact but thereafter essentially it doesn't matter if you find an adopter, then that's what matters first because time is running out. I mean it's not phrased that way but that's the message. (Barrister 5)*

One solicitor suggested that the statements can be of comfort to a (birth) parent or sibling, in other words that their function has an emotional as much or possibly more than a purely instrumental or functional role:

*They're not...You know, how much weight does a recital have? Not a lot but at least it's in there that the intention is there. You'll often do that as a way to help the parent feel better about the outcome but I'll never know whether, you know, anything comes of it. (Solicitor 10)*

## The effect of 'recitals'

Some concerns about the impact of the statements focused on questioning who would actually see them. And here the issue of where the statements are made was considered significant. One barrister noted that:

*...often that will be accompanied by...the guardian's report which is where you tend to find more sympathy for this and more of a narrative about why it's important...because if you just have it on the order alone it's not going to be picked up. (Barrister 5)*

*I've had judges say that, you know, given strong indications about inter sibling contact and if it's not in the form of an order then a recital but, you know, I don't know, where does that order go? Who ever sees it again? (Barrister 3)*

*Once you've got the placement order, the guardian and everybody then drops out so it's then just down to the local authority and then probably I would have thought when they're supporting the adopters and the adoption application, they're hardly going to highlight that. (Solicitor 7)*

More fundamentally, interviewees across all professions, while not explicitly opposed to such statements, were often highly sceptical about whether they had any effect; a concern that had little to do with who saw them.

Significantly, two judges expressed strong reservations, suggesting that the practice is far from consistent. What is also evident here is the slippage between the recital and the care plan:

*Well, I mean what power does it have is my thought as a lawyer? It's a nice sop. It's something which gives a statement of intent but it doesn't do much more than the care plan anyway, does it? (Judge 2)*

*That's written more in hope than expectation, isn't it...It's not something that I would do...I mean a care plan may say that the local authority will endeavour to find adoptive parents who are willing to promote ongoing sibling contact...but nothing short of an order is going to ensure that that contact takes place. (Judge 4)*

One judge while supportive of making statements nevertheless acknowledged their inherent weakness and that, 'we'd always be very clear that that was just a recital and had no legal effect' (Judge 5). A barrister was unsure about their effect: 'the extent to which that is actually given proper effort and consideration I'm not sure' (Barrister 4).

One IRO suggested that they can have an impact, but a potentially negative one in that it delays the finding of placement. She also confirmed that in the long term it had little effect :

*The youngest child has been placed for adoption but...they really struggled to find adopters that would consider any contact with siblings. So now the adopters that they've gone for, it's on the understanding that they might consider indirect contact but they would not consider any direct contact. When we were in the court process, the court was saying that they needed to specifically look for adopters that would be open to direct contact with siblings but it just got in the way. (IRO North Focus Group)*

One guardian, for example, suggested that the making of such statements was more common and did have a value:

*I think there is a slow shift taking place whereas where I think even the courts are beginning to think, well, if this is the best thing for the child we will order it. And family placements teams having now to sort of say to adopters, 'Look, if you're taking on a child we expect you, this is an expectation,' and as part of the planning process you...I think it's much easier to argue sibling contact. (Guardian 3)*

While the guardian here refers to courts making orders, on questioning it she noted that:

*...it's not an actual order saying there will be contact but giving a very strong indication, yeah. (Guardian 3).*

It maybe that confusion about their place and status might, sometimes, imbue them with more weight than exists in law, and that, as hoped they do indeed, 'encourage', 'put weight', and 'build in expectations' about the importance of sibling contact.

## If adopters change their mind

The concern emphasised by many of the practitioners was that even if a local authority does find adopters open to direct contact, in practice the problem arises at a later date as adopters are not bound by any 'agreement'. As the comments below indicate this touches on the larger fundamental issue of the rights of adoptive parents.

*They'll say something judicial and strong but, you know, it cuts no, you know...It doesn't butter the parsnips but they're very fine words...they express a hope that...the people who want to be adopters will be empathetic and sensible enough to realise why this is a good thing and it's not a threat to them.* (Solicitor 7)

*That means nothing. It means absolutely nothing. If adopters don't want contact, contact won't take place. And they can...And sometimes you'll have adopters starting contact and then say, 'No, I don't think this is right'.* (Guardian 1)

*I think there is still a kind of red line in terms of you don't force adopters to do anything.* (Barrister 4)

*...they're [judges] quite happy to put down a marker. But on the other hand I think that, you know, impinging on a prospective adopter's exercise of parental responsibility is still generally regarded as a no-go area.* (Barrister 2)

*It does happen whereby judges will say it is an important need though recognising it's unenforceable because the reality is people still don't in most cases go against the...it's often said it's left to the adopters.* (Solicitor 6)

*I've never had any adoptive parents who've said they would agree have ever done direct contact with a sibling that's in foster care. Ever. Even if they said they would.* (IRO North Focus Group)

Our young advisers had strong views about this and were adamant that, 'it's not fair', that adopters 'shouldn't, like, have the right'. They also indicated that they considered law, in some form, should play a role:

*There should just be like something signed so that they can't go back on what they've said. It should be like legal binding, like when they say, "Yeah" whilst they're in the middle of doing the adoption thing and they turn round to a social worker and say, "Yes, we will let her see her brother," it should be legally binding.* (YPPG1)

Some of the practitioners went as far as to suggest that adopters know that they need to appear open to or agree in theory to 'open adoption', but after the adoption order can do whatever they want.

*Actually all adopters these days are told to say or are told that basically if you won't consider post adoption contact, we won't consider you for adoption but once that order's drawn, it's entirely up to them.* (Solicitor 1)

*Well I mean there'd always been the idea that open adoptions were good but once someone's adopted, I mean that's your child and then it is up to you to decide...So you might during adoption process 'of course of course of course of course' but once, you know.* (Guardian 4)

*If the message going back to some people is well you were kind of shortlisted but you won't consider sibling contact so you didn't make the final cut, if that is being fed back to some families, I think there possibly is a risk that people are thinking we've got to say yes to this because we're always not being picked.* (Social Work North Focus Group)

Only one practitioner, a judge, queried this particular concern:

*I think most adopters are very open to doing whatever is best for that child. I don't think there's anything quite as cynical as that going on.* (Judge 1)

And a social worker noted that attitudes of adopters can genuinely change:

*I think the earlier people were in the process, they were much more open to that idea of just saying, yeah, give me the date and we'll go for it. But the further they were in that process, they were like wow, this is huge, how am I even going to like broach this with my 11-year-old child?, you know. And I also think that*



*adoptive parents, many different things have a certain view of things but as their relationship develops with their child, those views change. (Social Work North Focus Group)*

The dominance of the view that nothing can be done if adopters changed their minds was reinforced in our findings by the fact that only one person, a solicitor, suggested that an adopter could or should be asked 'to show *good reason* why you departed from what was an agreed position at that time' (Solicitor 9). This might have been an indirect reference to the limited case law on the matter. *In R (A Child) Wall LJ* held that a judge had been plainly entitled 'to take into account that the court would be reluctant to make an order in the face of *reasonable* opposition' ([2005] EWCA Civ 1128, at para 49, emphasis added). In support he cited Balcombe LJ in an earlier decision which clearly opens the door to potential challenges:

*Where adopters...simply refuse to provide an explanation for their change of heart...it is not appropriate for the court to accept that position without more.*

But that earlier judgment also suggested that it would not be difficult for adopters to satisfy the courts that their change of mind was reasonable:

*I am not saying that it should never be open to adopters to change their minds and resile from an informal agreement made at the time of the adoption...Nor need adopters fear that their reasons, when given, will be subjected to critical legal analysis. The judges who hear family cases are well aware of the stresses and strains to which adopters...are subject and a simple explanation of their reasons in non-legal terms would usually be all that is necessary. (Re T (Minors) (Adopted Children: Contact) [1996] Fam 34, at para 41E, also citing In re T (A Minor) (Contact After Adoption) [1995] 2 FCR 537)*

Moreover, that case concerned adopters' refusal to provide indirect contact by way of a report. Neither the case review nor the interviews provided any evidence of ordering any form of direct contact against the wishes of adopters, whether agreed or not.

## Post-adoption Contact Orders

One judge observed that while Section 26 orders are rare, that did not necessarily mean that post-adoption contact was not happening and did not rule out the possibility that less formal measures might be effective:

*I would be interested to know in those cases where the local authority say that they are going to persuade adopters to promote ongoing direct contact how frequently that happens and whether it's sustained or whether it just withers on the vine fairly quickly. (Judge 4)*

That the judge does not know coheres with the observation of other judges, lawyers and guardians that post proceedings, they are no longer involved unless, as one solicitor noted, 'somebody comes back to me'. (Solicitor 1).

More critical was Ryder LJ's observation that

*All too often adoption orders are made with all the best intentions for continuing sibling contact which are then thwarted for no particularly good reason...Perhaps more often than hitherto, courts faced with agreed contact post adoption might consider whether an order can give reassurance to the child by keeping an enduring relationship that is important and for some children critical to their welfare throughout their lives. (MF v London Borough of Brent and Others [2013] EWHC 1838, at para 35)*

His reference to 'agreed contact' is important and supports the emphasis made above about the importance and possible use of a record of an agreement, in any form, at a later stage being made available. In this case Ryder LJ made a contact order alongside an adoption order. A key finding is that post-adoption contact orders, under Section 51A of the Adoption and Children Act 2002, are highly exceptional.

This is not surprising as the government guidance advises that they are 'likely to be rare' and that:

*...where some form of continuing contact is proposed, whether direct or indirect, it is more likely that this will be a matter for agreement between the person concerned and the adopters. The court may however make a note on the court file about the agreement reached. (DoE, 2014, para 5.19)*

In the interviews and focus groups the silence about this provision was notable. Significantly this was despite the fact that one of the explanations for not using Section 26 was that it was too early.

Only one practitioner, a guardian, suggested there had been a change in practice, although not based on her own experience:

*I think that has...there's a slight change now to say, well, if it's such an important relationship for the children, we think then that we will make an order. But it's... I think courts would need to be persuaded...I think I have heard of a judge making an order for there to be contact...There used to be...no judge would make an order against adopters whereas now I think judges will say, If this is the right thing for the child then we will order it...They will order it. Not very often...Occasionally...very occasionally. (Guardian 3)*

The reference to the difficulty in persuading judges chimes with the judges' own experiences that suggest that they are most often persuaded *not* to. As one judge noted, an order is generally only made in the face of opposition, observing that local authorities are:

*Innately hostile to orders for contact post adoption...They have to be dragged kicking and screaming and sometimes they can be dragged. (Judge 4)*

The only solicitor who mentioned successful applications for a Section 26 Order, although less than a year, contrasted this with post-adoption orders.

*So at the placement stage I've done it under Section 26 on a number of occasions for sibling contact. Probably about eight going back to about 2006...If we then move on, and you know, the answer to this, whether any orders were made at the adoption stage, never. (Solicitor 6)*

A judge commented that:

*Yeah, obviously you can make a contact order when you make an adoption order. I've never done that but... because, you know, the adoptive parents are committed to make it work or they're not. (Judge 1)*

Another judge similarly noted that:

*I have no experience of an application for contact post adoption by a sibling...I haven't come across it. It's a kind of wall still. (Judge 2)*

Another solicitor, indicating a sometimes confusing slippage between Section 51A and applications under Section 8 of the Children Act 1989, went as far to say that after an adoption order has been made:

*There's no longer any public law involvement. And I think, you know, those relationships are going to sever whichever way you look at it. (Solicitor 1)*

Lack of clarity about the law was also evident in a guardian's response that:

*If there had been a very clear agreement I think you might persuade a higher court to look at it. I'm not quite sure under what basis legally but that's not my problem but it might be a human rights one. (Guardian 3)*

The key human rights issue is, as discussed above, the potential application of Article 8 to the right to respect for private and family life. The limited case law here was not referred to by any of the practitioners. But in the context of post-adoption applications there appears to be some dispute in the case law. In a case where a child whose brother had been adopted applied for leave to apply for contact with his sibling, Thorpe LJ held that he had 'a very strong Article 8 right to have a relationship with his brother as opposed to simply knowing of his brother's existence' (*Re B (Child)* [2011] EWCA Civ 509). However more recently, in a case with very different facts, Cobb J held that a blood relationship 'albeit not unimportant in many ways, does not on its own create a right' (para 43) and that where siblings no longer had a legal relationship because one of them had been adopted.

*...the making of an adoption order always brings pre-existing Article 8 rights as between a birth parent and an adopted child to an end. By analogy, the same must be true of relationships between birth siblings/half-siblings'. (Re TJ (Relinquished Baby: Sibling Contact) [2017] EWFC 6, at para 27)*

He also placed emphasis on the fact that they had no actual relationship, a point established in the case law applying the European Convention on Human Rights.<sup>42</sup> Our point here is not that the latter approach is necessarily wrong, but that there is a lack of clarity about the relevance of Article 8 rights to separated siblings post-adoption and that the approach above reveals a particular vulnerability for siblings looking to use law to help make or sustain contact.

There appears to be a Catch-22 here: post-adoption contact orders are, in theory, there to make adopters facilitate contact where they might not agree to it (because if they agree to it it could be argued that there is no need for an order). But where they do not agree to it the courts are unwilling/highly reluctant to order it.

*I'm not going to enforce it because the adopters are so anti it and it's going to disrupt their relationship with the child...so no orders are made. People wring their hands a lot. (Solicitor 6)*

The dominance of these perceptions is such that they might impact negatively on the chances of a sibling being granted leave to apply for a post-adoption contact order as very considerable weight is likely to be placed on an adopters concerns that contact might undermine the placement. The possibility of this has been strengthened by the provisions in Section 51A that in deciding whether to grant leave the court must take into account 'any risk there might be of the proposed application disrupting the child's life to such an extent that he or she would be harmed by it' and 'any representations made to the court by a prospective adopter or adopter' (ACA s 51A (a), (c)). In commenting on these provisions Bainham has argued that:

*The primary concern is to smooth the path of adoption and to discourage disruptive contact with the birth family...pride of place is given to the negative consideration of the risk of disruption to the child and consequential harm. There is no express acknowledgment of the positive benefits which the child might enjoy through ongoing contact with the birth family. (2015: 1363)*

The government guidance advises, preemptively perhaps, that:

*The circumstances in which a birth parent, relative or other person are most likely to seek the court's leave to apply for a section 51A order after adoption are likely to be those where an agreement for some form of continuing contact had been made, but was not adhered to. (DoE, 2014, para 5.22)*

A Solicitor concurred:

*The law allows for contact applications to be made but it's quite a convoluted process. What it becomes about at that stage is all very much about not upsetting the adopters and the family. (Solicitor 1)*

Even where leave is granted, and there is no evidence to suggest that courts are unlikely to grant leave, the same assumptions apply and the only practitioner who mentioned Ryder LJ's judgment above confirmed its exceptionality:

*I got leave but ultimately no order was made because the adopters were so opposed to it and they were saying the placement would be in jeopardy if that was allowed...If they renege on it I think all the authorities...I think I've seen one case where an order was made by Lord Justice Ryder against the wishes of adopters in 2008. (Solicitor 6)*

The same solicitor was also unsuccessful where an older sibling had found his adoptive sibling using social media and there had been ongoing contact, 'because the adopters said no' and on the basis of the judge's 'reading of the authorities' (Solicitor 6). Another solicitor had no experience of making post-adoption contact applications but this might in part be because his assessment of the chances of being successful were so low.

*Well, again, I suppose if it were to end up in court, the court would be considering the welfare of the adopted child as paramount, the stability of the placement and by and large you would expect that to trump issues about contact. (Solicitor 2)*

Some practitioners noted that, as at the placement stage, some judges opt instead of making an order to add a recital to the adoption order. A solicitor who said that she had 'never had a case where there's been an actual order made for post adoption contact' gave the example of a case where:

<sup>42</sup> *Lebbink v The Netherlands* (Application no. 45582/99) (2005) 40 EHHR 18.

*One of the older siblings...wanted reassurance that there'd be an order for her direct contact to continue...but, yeah...the judge wasn't that keen on the idea of that so we ended up in the situation where it was recorded on the order so obviously that just means it doesn't have the force...you couldn't apply to court to enforce that...I guess from the child's point of view it's still something with a court stamp on it that says this is... the court says that you should continue to have reasonable contact with your siblings...if there was to be any court proceedings in the future, you'd have to show good reason why you departed from what was an agreed position at that time. (Solicitor 9)*

Similarly, another solicitor noted that:

*I can't see that that wouldn't be a possibility but, you know, there is also the pragmatic view that well actually even if you have an order, you know, how are you going to enforce that? How's that going to happen? You know, do you bring these people kicking and screaming into this scenario? It's probably... That's why you need to be so careful with the adoption process and who you approve as adopters. (Solicitor 3)*

An additional barrier to post-adoption orders is that the arguments about the rights of adopters have a stronger force because of the change in their legal status, reflected in law in that they, unlike birth relatives, do not require leave under Section 51A. One barrister spoke of the:

*...entrenched view that because the parental responsibility of adopters should not be trammelled so they should decide like any other parent, you know, who their child sees and so on and that's a very, very powerful consideration. (Barrister 2)*

So ingrained are views about parental rights here that it is sometimes described in terms that suggest that it is an absolute legal right as opposed to a principle to the extent that one guardian seemed unaware that courts *do* have the power to order contact post-adoption:

*There's no jurisdiction over you...once a child's adopted you can't do anything. (Guardian 1)*

*Yeah, the judge might say, 'Look, it's desirable' but basically what can he or she do? Nothing. (Solicitor 4)*

A barrister observing how difficult it would be to persuade a judge to make a post-adoption contact order demonstrated how the 'rights' of the adopters is in practice entwined with concerns about the practical effects of an order:

*I can certainly see many judges saying, 'Well am I going to force these adopters to do this? Am I going to put this placement and the stability and security at risk by saying you must do that?' (Barrister 4)*

## Birth parents and sibling contact

A key finding from the interviews was that the question of post-adoption sibling contact was connected and could not always be separated from the issue of birth parent contact. This is most explicit in the concerns about the potential for contact to undermine the placement. One judge noted how these concerns are routinely premised on the harm caused by secrets.

*And what happens is when you explore sibling contact with the adoption worker, they give you a list of things that tells you why it can't happen...the main reason is that to make children keep secrets is fundamentally wrong and they would have to keep secrets about where they live, what school they go to, what their mummy's and daddy's names are, what their surname is and the list goes on. And so what they say to you is, if you order this sibling contact, judge, what you're doing is you're making little Joey keep secrets because he's having contact with his elder sibling and his elder sibling is having contact with mum and dad and therefore Joey will tell his brother, his brother will tell mum and dad and therefore the placement will break down...They tell you that every time. Clearly on the training course and they are taught that...It's the same thing. I could write their evidence on that point. (Judge 3)*

Sibling contact post-adoption could potentially be the basis of another application, not just an application for contact but potentially an application to revoke an adoption order. In practice these can be complex because, as discussed above in Part 5.5 it can be seen as a 'backdoor' application by the parents. A solicitor commented that:

*It's a bit of a double-edged sword for parents because of course local authorities will say if they're still challenging the adoption they haven't accepted that this is going to happen and so they'll constantly undermine the placement which I think is a bit superficial but... If they happen to say, look, we're supportive of the adoption but we'd quite like to have contact, that can be a slightly different set-up. The local authorities and guardians tend to be more amenable to a parent who says I'm not challenging the placement. (Solicitor 1)*

Similarly, a judge noted that post-adoption contact disputes 'generally speaking' come 'further down the line when they've exhausted everything and think "well what else can we do?"' (Judge 1). The possibility of utilising an argument about sibling contact in order to revoke an adoption order, that the lack of contact, even if initially agreed, could be deemed a relevant change of circumstances was only raised by one barrister who noted that:

*I mean the rationale for an application to revoke a placement order or seek leave to oppose an adoption will be very much based on parental circumstances. I don't think I've ever come across the rationale for either of those two types of applications being related to sibling contact. (Barrister 1)*

Even if leave to apply is granted, and there is some, albeit limited, indication that factors relating to siblings might possibly be considered relevant,<sup>43</sup> on the substantive issue, evidence of security and stability in the new adoptive home is a factor that can be taken into account and would weigh against any proposed change.<sup>44</sup>

One of the main reasons why parents may be involved with a sibling contact application is because there may be no one else who will. One barrister in part explained the lack of sibling contact orders post-adoption as simply reflecting the fact that, 'there's no one there to apply for one (Barrister 2). What is possibly alluded to here is that the possibility of applying for a contact order by a sibling is dependent on a wide number of factors unrelated to the actual legal process: a sibling knowing that they can apply, being advised how to apply, IROs (if the child is looked after) assisting them, and of course a sibling knowing they have a sibling.

<sup>43</sup> *Re T (Children)* [2014] EWCA Civ 1369.

<sup>44</sup> *Re W (A Child)* [2016] EWCA Civ 793; *Re M P-P* [2015] EWCA Civ 584.

## 7: DISCUSSION

A recurring finding throughout this research has been the reluctance of courts to use their powers to order contact between siblings. Judicial awareness of the possibility of making orders is not in doubt, but there appears to be a lack of clarity about when, in practice, the orders should be used. This is the case in all contexts where court orders can be made: whether for children in care (CA 1989 s 34); alongside a placement for adoption order (ACA 2002 s 26) or alongside or after an adoption order (ACA 2002 s 51A) or by way of private law applications by siblings with looked after or adopted siblings (CA 1989 s 8).

### Legal explanations

As noted above proposals have been made to remove the leave requirements which apply for some siblings in some contexts. Alongside mixed views on either side of that debate, our key finding is that the leave requirement is not the primary barrier to applications for sibling contact orders. Lack of knowledge about the possibility of applying for contact and access to information and support in making applications were perceived as more important.

In Scotland, proposals have been made to amend the statutory requirements to require the courts to focus more explicitly on the impact of decisions on siblings and to place a specific duty to consider sibling contact (Jones and Jones, 2018). One of the barristers we spoke to suggested that the statutory framework itself might have an impact on the courts' approach to contact in adoption proceedings.

*I think maybe it's because there is a lack of legally binding powers on them to make them really have to look at it. I think there's a very strong sense of...in my very personal opinion (I've never talked to a judge about this)...a resignation to the fact that it's just not workable, not realistic, it will mean that children are less likely to be found placements, and a reluctance to take a stand judicially against that by the decisions that they make. (Barrister 5)*

However no one else made a similar observation. The only other barrier to contact orders that has a legal or doctrinal basis is the perception in adoption proceedings that, because contact orders are exceptional and required only where contact is deemed essential, it can and is argued that alternatives to adoption should be considered, but that as a result the 'nothing else will do' threshold has not been met.

### Assumptions and attitudes

While not disregarding the points above, we found that the current lack of orders could more fundamentally be explained by the existence of deep seated attitudes and assumptions. The frequency and matter-of-fact dominance of these views was evident from the case review and all the professionals we spoke to. Some of these were particular to types of proceedings. For example, the view that orders under Section 34, in connection with children in care, were 'unnecessary' because contact 'usually happens' was never expressed in the context of contact orders in adoption proceedings. Conversely, the assumptions that contact orders will reduce the pool of potential adopters, that contact is only appropriate with the agreement of adopters, and, in split placements, will undermine the placement, were not mentioned in the context of care proceedings. And the view that orders under Section 26 were 'pointless' and not 'meaningful' because adopters were not yet identified, distinguished contact orders at the placement stage from those at the time and after adoption orders were made.

But alongside these rationales were three assumptions that explain the absence of and resistance to the making of contact orders across the board. First, that court orders are inflexible, secondly that courts are, at best, not a 'child-friendly' or appropriate environment for the resolution of these disputes and, at worst, are damaging for children, and thirdly, that orders are unenforceable. Combined, these three assumptions result in the widely shared view that agreement rather than orders is preferable, more effective and in a child's 'best interests'. As one solicitor acknowledged (echoing concerns noted above in Part 3.5):

*Ending up in court, that would feel like a defeat really in terms of trying to do what's best for certainly the subject child but also the other siblings. (Solicitor 2)*



Some of the social workers expressed strong reservations about court orders and highlighted the perception of them as punitive.

*My instinct would be that there'd be a kind of kick back to that because I think people would resent the idea of being told or, you know, asked to do that in a very formal law way. (Social Worker North Focus Group)*

*It's interfering with their family life...how would you actually then enforce it? You're kind of pulling people into the court arena and telling them off really. (Social Worker North Focus Group)*

*I suppose for me if you put a court order on something it's seen as being quite punitive whereas actually what you're talking about is educating them as to the benefits of it and making it this really positive thing I suppose, isn't it. Just seeing the positives of it. (Social Worker North Focus Group)*

Other typical comments emphasising the assumptions above were made by three solicitors.

*If you're in a situation with ongoing contact, the courts will generally, and us as lawyers representing everyone, will do what we can to avoid having defined orders for contact made because it doesn't allow the flexibility that you need necessarily to manage what is a really fluid situation. (Solicitor 9)*

*I think it does need to be sort of more flexible in terms of siblings...There's no one set formula to follow and it does need to be sort of case-by-case. (Solicitor 8)*

*There is also the pragmatic view that well actually even if you have an order, you know, how are you going to enforce that? How's that going to happen? You know, do you bring these people kicking and screaming into this scenario? (Solicitor 3)*

Our young adviser's views about court involvement and the use of court orders to support sibling contact were notably distinct from any of the adult professionals we spoke to.

*Well the courts are involved in loads of different other parts of people's lives so it really doesn't make no changes in being part of like siblings' lives as well...they make orders for kids to see parents, make orders sometimes for kids to see grandparents as well, so why not just throw in siblings as well?*

*the law could decide for them...so they could actually make it happen for them, for the siblings.*

*it should be up to the child if they go to court...court orders should be used because it gives the child more comfort.*

*I thought it was really good because I always wanted to know everything that was going on around me and I feel like with social services they never really were 100% with me. Like they would always like make things seem better than they were or whatever so I think that actually like be in the courtroom and hear what was being said about me, because it's about me, was actually like really helpful.*

*...the professionals think they're protecting children in a way...I hated not knowing anything. (YPPG2)*

We do not claim that these observations by the young advisers are representative of young people involved in care proceedings (they were members of the Family Justice Young People's Board and therefore likely to be unusually familiar with judges and courts). But we note that they reinforce research that questions assumptions premised on 'best interests' about not involving children in proceedings (Fortin, 2009; Piper, 2000). Notwithstanding the potential distinctiveness of the young people we spoke to, their comments pose a powerful corrective to dominant understandings which too easily equate childhood with 'vulnerability' in ways that, albeit unintentionally, often render young people silent.

Our argument is not that the courts *should* be making more sibling contact orders, but that in the context of widely held concerns about the inadequacy of existing contact provision, the role of the courts and the effective limitation on their powers by the dominance of these views is worth questioning.

In opening up a conversation about contact orders we contrast the position in public law with that in private law contact disputes and look at the issue through the framework of children or sibling rights.

## Public/private law distinctions

*Well private and public law are very, very different animals. (Judge 1)*

*The problem with a contact order in public law context is that it promotes litigation which really isn't helpful in the public law arena. (Judge 2)*

What is striking about the preference for agreement, common assumptions about contact orders as inflexible and unenforceable, and about courts as being 'child-unfriendly', is the extent to which they mirror the concerns about contact orders in private law contact disputes. And yet in practice the use of court orders differs substantially. As Bainham has commented:

*The only way in which post-adoption contact can be ensured is by court order. No-one doubts that contact orders are frequently necessary in the private law to ensure that contact happens and there is no good reason why the public law should be any different. (Bainham, 2015: 1362)*

One judge also highlighted the different expectations about contact:

*...in care cases, you know, children will see siblings and see parents once a month / four times a year, yet if it was a private law case, it'll be once a fortnight and you will not tell me there's a difference. I can't figure out what the difference is....You ask that question of a social worker in a witness box, or a guardian, they look at you as if you are mad and they chuck out stability, security, undermining placement. And with mum and dad that would be different why? Tell me. So I don't know. I don't get it. (Judge 3)*

A barrister suggested that in the context of children in care the 'lack of training' of professionals and 'financial considerations if they don't live locally to one another' (Barrister 5) were distinctive factors about contact in the public law context.

In private law disputes the benefits of contact with non-resident parents, in reality usually fathers, create a presumption about contact that is difficult to rebut and has been strengthened by recent statutory reform (Kaganas, 2018; Fortin et al, 2012). The majority of private law contact disputes are resolved without going to court, but where applications are made, court orders are the norm rather than the exception. Moreover, the resolution of disputes about contact outside of the courtroom, whether by legal advice or mediation, operates in the shadow of the very clear statements from the courts about the presumption about contact (Kaganas, 2018). Consequently, while the advantages of reaching an agreement about contact are emphasised in private and public law, in the latter context adopters, in particular, are not under any pressure to agree. Case law, guidance and our findings here make clear that while leave is likely to be granted where there was a prior agreement about contact, on the substantive issue the making of an order against the wishes of adopters is exceptionally unlikely.

The contrast between representations of and responses to *adopters* unwilling to agree to contact between siblings, and *mothers* unwilling to agree to paternal contact is stark. Concerns about a perceived failure to address the problem of 'intransigent' and 'unreasonable' mothers in private law has resulted in expressions of judicial anxiety about the public confidence in the courts, an increased willingness to countenance enforcing contact orders by both punitive and therapeutic measures, and legal reform (Kaganas, 2018, 2010).

It is important to emphasise that while our findings suggest that the resistance to contact by adopters may indeed be at times 'intransigent' and 'unreasonable' we are not suggesting that adopters *should* be treated more like mothers in private law proceedings. The contexts are substantially different and siblings are not parents and the assumptions underlying developments in private law have been subject to rigorous criticism (Fortin, Ritchie and Buchanan 2006; Kaganas, 2018). But noting the contrast is valuable to the extent that it highlights the contingency of law's role in resolving disputes about contact. In particular the comparison highlights how assumptions about contact post-adoption and contact post-parental separation are *both* dominated by understandings of, and political investments in, the value of enhancing parental responsibility. In the context of non-resident fathers this has led to a more active, invasive role for law, whereas in the context of adopters it has led to the opposite. In both contexts it is possible to question the extent to which it is assumptions about the role of these parents, as opposed to a focus on the needs of individual children, which informs decision making, and in particular understandings of the role of the courts.

When judges in our research considered the differences between public and private approaches to contact orders many of them identified that the purpose of them in the private context was to resolve a conflict which the parties were unable to.

*...if you need an order at all it's because the parents simply cannot agree...you don't make an order in private law unless it's better for the child to do so than not to do so but if you've got two parents who are at loggerheads then it almost invariably is better so that everybody's absolutely clear what is going to happen. (Judge 1)*

*I think with private law, what you're having to do is to step in and be a parent where the parents have fallen out so badly they can't exercise their parental responsibility in harmony, so you are a kind of uber parent who's coming in and making a regime for the arrangements for the child because the parents aren't able to do it for themselves. (Judge 2)*

The judges also emphasised that their involvement was premised on the presumption about the benefits of contact with a non-resident parent.

*Well in private law proceedings, it is a given that the purpose of the proceeding is to try and preserve the role of both parents in the life of the child. That's a very different scenario from the scenario you get in care proceedings and in adoption proceedings. (Judge 4)*

*In private law proceedings you will not necessarily, although that's not a universal rule, you will not necessarily be ruling one parent out and saying that parent has nothing to offer this child. In care and adoption proceedings that's exactly what you're saying sometimes. (Judge 4)*

Similarly, in explaining why litigation should be avoided in public proceedings a judge noted that 'it fires up the parents again' (Judge 2).

What is noticeable in the above comments by the judges is the centrality of parental responsibility as a factor that legitimises recourse to the making of contact orders. Both the inability for parties to resolve a conflict and the potential benefits of clarity apply just as much in sibling conflicts in public law cases. But in the public law context parental responsibility is not the fault line. Birth parents are severely compromised when attempting foreground arguments about sibling contact; whether or not their children are adopted. And the courts are reluctant to instruct either local authorities, as the corporate parent for children in care, or adopters in how to exercise their parental responsibility.

Piper links the underlying approach to the wider context, observing that:

*The currently important political message that individuals must take responsibility for their lives, their children and their actions is not a novel message: the giving of priority to the exercise of parental responsibility, if necessary over other aspects of the child's well-being, has a very long history. (2000: 271)*

Applying this framework to contact disputes about siblings in public law helps explain the courts' reluctance to make orders, despite the importance of sibling relationships being widely recognised. Managing inter-sibling child relationships falls squarely within the remit of parental responsibility.

In contrasting public and private law approaches to contact orders, while the different role of parents is critical, it is also possible to identify a distinct approach to assessments of children's best interests.

One of the solicitors we interviewed suggested that the needs of children in public law are perceived differently.

*...one of the reasons why we're so ready to separate in public law system is because the children come from dysfunctional homes and have suffered significant harm, there's an assumption – and it may well be correct – that these children are damaged goods in some way, have higher levels of need..they're perceived to be more complex, more damaged and therefore...people are less willing to...worry about things like contact between children because the focus is on just dealing with all those observable symptomology in the child. (Solicitor 6)*

As the solicitor notes, these assumptions may well be correct. What is noticeable here is the extent to which the emphasis on the value of stability, which might preclude contact, mirrors the approach to understanding children's

welfare in private law disputes in an earlier period. Neale and Smart identified that prior to the current dominant ideal in private law which emphasises co-parenting, biological families and, consequently, an enhanced role for non-resident fathers, the dominant assumptions about child welfare emphasised continuity of care, stability and avoidance of conflict, and that these ideas were supported by the 'scientific' research at that time (1999).<sup>45</sup> The change in private law occurred not by law, but by the emergence of new assumptions about 'best interests' which reflected shifting social and political attitudes. In the same way, the approach of the courts to sibling contact is most likely to change not through any specific legal reform but by a shift in assumptions about children's 'best interests'.

### Sibling relationships and 'best interests'

A critical question is in what circumstances are the benefits of the sibling relationship, while acknowledged, likely to be perceived as capable of outweighing other counter-assumptions. That at present the sibling relationship is routinely outweighed by other factors attests to the powerful coming together of a number of factors, in particular the privileging of parental responsibility generally. But listening to young people suggests that this emphasis can overlook what they themselves often consider as important. Our young advisers highlighted the value of thinking about children's rights as extending to or including an appreciation of the importance of the sibling relationship.

*...obviously a parent and a sibling's different but they should have kind of like near enough similar rights if you get me. Because no matter what, a sibling will have that special connection that a parent doesn't have. (YPPG2)*

*It's like siblings don't actually have rights to see each other but they should have... Again, it's all about our rights as a young person, our sibling rights. (YPPG2)*

This call to rights is compelling. In terms of bringing about change, without any doubt the language of rights and mobilising an identity through 'rights' is an important and effective vehicle. Campaigns for fathers and grandparents attests to this and the absence of sibling rights being spoken of or understood in the same way is notable. The acceptance of a child's right to have contact with his or her parents is deeply embedded in legal practice, to the extent that it is understood to impose a duty on the state to facilitate it. The concept of the 'reasonable judicial parent' legitimises a highly proactive role (Monk, 2018). But underlying this stance is the perception that parents not only have rights but a role to play. 'Parenting' is not just a status but an activity imbued with deep psychological, political and cultural significance (Lee et al, 2014). The sibling bond or relationship may undoubtedly have a deep and enduring impact on children and young people's lives, but it is not a relationship that society has attributed a role to, a function. Lord and Borthwick, in their influential guide suggested that:

*The decision to separate permanently siblings who have lived or are currently living together should, in our view, be treated with the same seriousness as the decision to separate children permanently from their parents. (2008: 21)*

That this view is not applied might have something to do with the fact that, as Sanders notes, 'the rules for conducting a sibling relationship have never been established, ambivalence is its keynote and instability its underlying condition' (2002: 1). In the context of a heightened focus on the essential role of parents, acknowledging this is a challenge facing policy makers and practitioners concerned about the undervaluing of the sibling relationship. Attributing considerable more weight to the value of the sibling relationship in proceedings may only be possible with a more radical re-evaluation of relational roles within the family. What form that takes, whether it is desirable and whether law has a role to play are matters for debate.

<sup>45</sup> In particular the work of Goldstein, Freud and Solnit (1979).

## 8: CONCLUSIONS

‘Sibling relationships’ are not an issue waiting to be discovered. A recurring finding throughout the interviews and focus groups was a recognition of the importance of the relationship for children and young people. It is the professional commitment to this which underpins concerns that more could be done to better protect and sustain connections between siblings.

We began by asking ‘who is a sibling?’. The case review and interviews suggested that relationships between full and half siblings are likely to be given strong recognition and that there was an ethical commitment to treating them equally. But in keeping with the overall finding of a gap between practice and ideals, despite a widespread understanding of broader possibilities of siblinghood beyond biogenetic connections, step siblings and especially foster siblings are rarely given weight in legal decision making. The uncertainty and lack of clarity in the statutory provisions about the status of step siblings, mirrored a general degree of incoherence and lack of consistency about siblings in law.

This lack of clarity in ‘legal siblinghood’ reflects observations in the wider literature about the multiplicity and contingency of understandings about siblings. This came to the fore when we examined the knowledge and theories that are used in ‘sibling assessments’. We found confusion about the origin, meaning and application of the psychological concepts ‘attachment’ and ‘parentification’. These concepts, based on understandings of adult-child relationships have taken on new meanings as tools to make sense of child-child relationships. And a further removal from their original usage was observed in the application of the ideas in legal decision making. Noting this is not a criticism: law has a function distinct from psychology. Law requires the making of difficult binary decisions, and assumptions are a necessary part of the legal tool-kit for evaluating a child’s best interests. However our findings suggest a need for reflexivity about the assumptions, not a disregarding of them. Notwithstanding the complexity of knowledge about siblings, we also found that greater weight appears to be attached simply to the age of children.

Age as the key determinant was a recurring theme in the research. It is critical in determining placements. And this was particularly important for siblings as we found that placement was a key factor in the determining of contact arrangements. From the case review there was a clear expectation and convention that direct inter-sibling contact will always take place unless a child is adopted. The practitioners, while confirming the assumptions about contact and adoption, suggested that in reality contact provision in other contexts could not be taken for granted. In the context of special guardianship much depended on parental or familial support for contact. The crucial importance of guardians in providing rigorous attention to contact in care plans and of IROs in reviewing the plans and ensuring they are put into practice, was emphasised throughout, and concerns about policies that might restrict the effectiveness of both professional roles was a recurring theme.

As adoption is widely understood to be the most significant ‘risk’ factor for a sibling relationship we were interested in examining how key debates and judicial interventions had impacted on placement decisions involving siblings. A consistent finding from the interviews was the perception that the key case of *Re B-S* was about parents and not siblings. But a number of indirect consequences were noted. The overarching finding here from particularly concerned practitioners, was a sense of frustration at the starkness of the choice between the stability of an adoption placement with no direct sibling contact or living together or in separate long term fostering placements where contact would be assured.

A clear finding from the case review and the interviews was that adoption is perceived very much as still being, essentially, ‘closed’. A recurring assumption throughout the data was that the security and stability of placements will be undermined by contact with siblings living with or in contact with birth relatives. The embeddedness of this assumption was such that in proceedings and decision making it functions as a rebuttable presumption. And the possibility of effectively challenging it is restricted by the belief that attempts to impose direct contact will deter potential adopters and that post-adoption contact should, and can, only take place with the agreement of adopters.

A key finding was that it is the assumptions about placements, ‘permanence’, ‘stability’ and understandings of adoption which informs decisions. The legal framework does enable concerns about sibling relationships to be expressed, but they are outweighed by these other factors. Despite concerns that insufficient weight was placed

on the interests of older siblings we found a notable ambivalence and uncertainty about the use and applicability of Article 8. Perhaps most significantly in the context of law was a recurring finding that there was a reluctance to use court orders to support sibling contact. There was also a lack of awareness of the possibility amongst non-legal practitioners of the availability of such orders. But court orders are of course a blunt tool. There are good reasons for being cautious about their use. However in light of the above concerns, we suggest that it may be timely to open up a conversation about the role that they might play in supporting the sustaining of sibling relationships.



## 9: POLICY RECOMMENDATIONS

- To consider the inconsistency and lack of coherence in references to siblings, we recommend a review of primary and secondary statutory material by the Department of Education and Parliamentary Counsel. In particular to:
  1. Clarify references to step siblings in child and adoption law.
  2. Remove references to 'blood' in definitions of siblings in the context of adoption.
  3. Consider developing internal drafting guidance about siblings.
- To be attentive to children and young people's own understandings of their sibling relationships, we recommend that professionals recognise that the word 'sibling', along with distinctions such as half, full, step and foster, can make children fearful that relationships with their brothers and sisters are not fully appreciated. We recommend wide dissemination of the Family Justice Young People's Board's Top Tips for professionals when working with brothers and sisters.
- To ensure consistency in practice, we recommend further research about allocation and gatekeeping practices in the Family Courts in cases involving sibling groups.
- To strengthen the existing presumptions about contact between 'looked after' siblings, we recommend extending to siblings the existing duty on local authorities in Section 34(1) of the Children Act 1989 to allow all 'looked after' children reasonable contact with their parents.
- To ensure that children and young people are aware of, and more able to exercise, their rights to make applications for contact orders with their siblings, we recommend:
  1. The removal of the requirement in Sections 10 and 34 of the Children Act 1989 that siblings must first apply for permission to make an application.
  2. That at the end of care proceedings, children's solicitors provide advice about the possibility of applying for contact orders, particularly where contact arrangements are stipulated in care plans or recitals.
- To clarify the circumstances in which it is appropriate to make contact orders under Sections 26 and 51A of the Adoption and Children Act 2002, we recommend the provision of judicial guidance.
- To enhance rigour in the assessment of sibling relationships, and to emphasise the importance of reflexivity in the application of assumptions, in particular about age, 'attachment' and 'parentification', we recommend:
  1. Wide dissemination of Beyond Together or Apart: Planning For, Assessing and Placing Sibling Groups (Beckett, CoramBAAF, 2018).
  2. A review of the existing provision of professional training about sibling relationships for social work and legal practitioners.

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